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SUPREME COURT OF THE UNITED STATES.

No. 164.

ELON FARNSWORTH AND EDWARD P. COWLES, APPELLANTS,

vs.

THE MINNESOTA & PACIFIC RAILROAD COMPANY, THE ST. PAUL & PACIFIC RAILROAD COMPANY, THE FIRST DIVISION OF THE ST. PAUL & PACIFIC RAILROAD, THE STILLWATER & ST. PAUL RAILROAD COMPANY, THE NORTHERN PACIFIC RAILROAD COMPANY, EDMUND RICE, TRUSTEE, &C., HORACE THOMPSON, TRUSTEE, &C., GEORGE L. BECKER, TRUSTEE, &C., WILLIAM G. MOORHEAD, TRUSTEE, &C., SAMUEL M. FELTON, TRUSTEE, &C., JAY COOKE, TRUSTEE, &C., AND J. EDGAR THOMPSON, TRUSTEE, &C.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED APRIL 8, 1875.

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1 In the circuit court of the United States for the district of Minnesota, eighth circuit. In equity.

To the honorable the judges of the circuit court of the United States for the district of Minnesota, eighth circuit, sitting in equity:

Elon Farnsworth, of Detroit, in the State of Michigan, who is a citizen of the State of Michigan, and Edward P. Cowles, of the city, county, and State of New York, who is a citizen of the State of New York, bring this their bill of complaint against The Minnesota & Pacific Railroad Company, a corporation created by and existing under the laws of the State of Minnesota, the St. Paul & Pacific Railroad Company, a corporation of said State of Minnesota, and having its office and principal place of business at Saint Paul, in said State.

UNITED STATES CIRCUIT COURT,
District of Minnesota, ss:

ELON FARNSWORTH & EDWARD P. COWLES
vs.
THE MINNESOTA AND PACIFIC RAILROAD COMPANY, The St. Paul & Pacific Railroad Company, The First Division of the St. Paul & Pacific Railroad Company, The Stillwater and St. Paul Railroad Company, The Northern Pacific Railroad Company, Edmund Rice, trustee, &c., Horace Thompson, trustee, &c., George L. Becker, trustee, &c., William G. Moorhead, trustee, &c., Samuel M. Felton, trustee, &c., Jay Cooke, trustee, &c., and J. Edgar Thompson, trustee, &c.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 13th day of January, A. D. 1873, came Elon Farnsworth and Edward P. Cowles, the plaintiffs above named, by Messrs. Masterson & Simons, their solicitors, and filed in the clerk's office of said court their bill of complaint in writing, which is in the words and figures following, viz:

2 Edmund Rice and Horace Thompson, who are citizens of the State of Minnesota, residing at Saint Paul, in said State, who, with Samuel J. Tilden, of the city and State of New York, are joint trustees of the said Saint Paul & Pacific Railroad Company, and of the holders of certain bonds of the said company, the names of which holders are unknown to these complainants, and which said Samuel J. Tilden is not made a party defendant herein for the reason that he is a citizen of the State of New York, the same as one of said complainants.

The First Division of the Saint Paul & Pacific Railroad Company, claiming to exist as a corporation under the laws of said State of Minnesota, and in fact existing and doing business as such corporation, having its principal office and place of business at St. Paul, in said State; the said Edmund Rice and Horace Thompson, who are, with the said Samuel J. Tilden, joint trustees of the said First Division of the Saint Paul & Pacific Railroad Company, and of certain other holders of bonds issued by said company, (the names of such holders being unknown;)

George L. Becker and the said Horace Thompson, who are citizens of the State of Minnesota, residing at Saint Paul, in said State, and who, with George T. M. Davis, who is a citizen of the State of New York, are joint trustees of the said First Division of the St. Paul & Pacific Railroad Company, and of certain other holders of bonds issued by said company, (the names of such holders being unknown,) which said George T. M. Davis is not made a party defendant herein for the reason that he is a citizen of the State of New York, the same as one of the
3 complainants; the said George L. Becker and Horace Thompson, who, with the said Samuel J. Tilden, are joint trustees of the said First Division of the Saint Paul & Pacific Railroad Company, and of certain other holders of bonds issued by said company, (the names of such holders being unknown;) the said George L. Becker and Horace Thompson, and William G. Morehead, who is a citizen of the State of Pennsylvania, residing in Philadelphia, joint trustees of said First Division of the Saint Paul & Pacific Railroad Company, and of certain other holders of bonds issued by said company, (the names of such holders being unknown;) the said Horace Thompson, George L. Becker, and William G. Moorhead, joint trustees of the Saint Paul & Pacific Railroad Company, and of certain other holders of bonds issued by said company, (the names of such holders being unknown;) the Stillwater and Saint Paul Railroad Company, a corporation of the State of Minnesota, having its place of business in said State; Samuel M. Felton and William G. Moorhead, who are citizens of the State of Pennsylvania, residing in Philadelphia, joint trustees of the said Stillwater & Saint Paul Railroad Company, and of the holders of certain bonds issued by said company, (the names of such holders being unknown;) the Northern Pacific Railroad Company, a corporation created and existing by and under the laws of the United States, and having an office and doing business in the State of Minnesota; Jay Cooke and J. Edgar Thomson, who are citizens of the State of Pennsylvania, residing at Philadelphia, in that State, trustees of the said Northern Pacific Railroad Company, and of the holders of certain bonds issued by said company, (the names of which bondholders are unknown.)

4 And thereupon your orators complaining show unto your honors as follows:

First. On the third day of March, in the year eighteen hundred and fifty-seven, the Congress of the United States passed an act, which act is as follows, (and which is published in volume 11 of the Statutes at Large, on pages 195-'6,) to wit:

March 3d, 1857; Statutes at Large, pages 195-'6.

"An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain rail-roads in said Territory, and granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in said State.

Grant of lands to Minnesota for railroads.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads, from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the legislature of said Territory may determine:

"From Saint Paul and from Saint Anthony, via Minneapolis, to a con-

venient point of junction west of the Mississippi, to the southern boundary of the Territory, in the direction of the mouth of the Big Sioux River, with a branch via Faribault to the north line of the State of Iowa, west of range sixteen; from Winona, via Saint Peter, to a point on the Big Sioux River south of the forty-fifth parallel of north latitude; also, from La Crescent, via Target Lake, up the valley of Root River, to a point of junction with the last-mentioned road east of range seventeen;

"Every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said Territory or future State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands (thus selected in lieu of those sold, and to which pre-emption rights have attached, as aforesaid, together with the sections and parts of sections, designated by odd numbers, as aforesaid, and appropriated as aforesaid) shall be held by the Territory or future State of Minnesota, for the use and purpose aforesaid: Provided, That the land to be so located shall in no case be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches: Provided further, That the lands hereby granted for and on account of said roads and branches, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever; and provided further, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

Grant in lieu of lands pre-empted or sold.

Lands, how applied.

Act not to apply to reservations except as to right of way.

"SEC. 2. And be it further enacted, That the sections and parts of sections of land which by such grants shall remain to the United States, within six miles on each side of said roads and branches, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry until the same shall have been first offered at public sale at the increased price.

Price of alternate sections doubled.

"SEC. 3. And be it further enacted, That the said lands hereby granted to the said Territory or future State shall be subject to the future disposal of the legislature thereof, for the purposes herein expressed, and no other; and the said railroads and branches shall be and remain public highways for the use of the Government of the United States, free from

Object of grant.

Railroads to be a highway for Government.

toll or other charge upon the transportation of any property or troops of the United States.

Lands how disposed of.

"SEC. 4. And be it further enacted, That the land hereby granted to said Territory or future State shall be disposed of by said Territory or future State only in the manner following, that is to say: that a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, and included within a continuous length of twenty miles of each of said roads and branches, may be sold; and when the governor of said Territory or future State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads and branches having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads or branches, may be sold; and so from time to time, until said roads and branches are completed; and if any of said roads or branches is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States.

Transportation of mails.

"SEC. 5. And be it further enacted, That the United States mail shall be transported over said roads and branches, under the direction of the Post-Office Department, at such price as Congress may by law direct: Provided, That until such
8 price is fixed by law, the Postmaster-General shall have the power to determine the same.

This act not to apply to lands in any Territory till their title is extinguished.

"SEC. 6. And be it further enacted, That in case any lands on the line of said roads or branches are within any Indian territory, no title to the same shall accrue, nor shall the same be entered upon by the authority of said Territory or State until the Indian title to the same shall have been extinguished.

Similar grant to Alabama.

"SEC. 7. And be it further enacted, That there be, and is hereby, granted to the State of Alabama, for the purpose of aiding in the construction of a railroad 'from the line of Georgia, on the Chattahoochee River, to the city of Mobile, Alabama,' through the counties of Henry, Dale, Coffee, Covington, Conecuh, Baldwin, and Mobile, and a branch railroad from Eufaula to Montgomery, through the counties of Barbour, Pike, Macon, and Montgomery, chartered by the State of Alabama by an act entitled 'An act to authorize the Savannah and Albany Railroad Company to extend their railroad from the line of Georgia, on the Chattahoochee River, to the city of Mobile, Alabama, and to extend a branch road from Eufaula to Montgomery,' approved December twentieth, eighteen hundred and fifty-three, alternate section of the public lands to the same extent and in the same manner and upon the same limitations and restrictions in every respect as was granted to aid in the construction of other railroads under an act of Congress entitled 'An act granting public lands in alternate sections to the State of Alabama to aid in the construction of certain railroads in said State,' approved June three, eighteen hundred and fifty-six.

"Approved March 3, 1857."

And, second. On the nineteenth day of May, in the said year eighteen hundred and fifty-seven, the said Territory of Minnesota, by an act of her legislature, (which is published in the laws of the extra session thereof for that year on page 70,) accepted the said grant of lands made to her by said act of Congress upon the conditions, limitations, and trusts, and to and for the uses and purposes in said act of Con-
9 gress expressed, and then assumed and undertook the execution of such trust, and to carry into effect the purposes and intent of

said act of Congress; and to that end the legislative assembly of said Territory, on the twenty-second day of May of that year, passed an act, (which is published in the session-laws of said Territory for the extra session of 1857, on pages 3, &c.,) which act is as follows:

Laws of extra session, 1857, pages 3, &c.

"An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State,' and granting certain lands to railroad companies therein named.

"Be it enacted by the legislative assembly of the Territory of Minnesota:

"CHAPTER 1.

Minnesota and Pacific Railroad Company incorporated.

"SECTION 1. All such persons as shall become stockholders in the company hereby incorporated shall be, and are hereby, created and declared a body politic and corporate by the name and style of the Minnesota and Pacific Railroad Company, and by that name shall have perpetual succession, and shall have and enjoy all the powers, privileges, franchises, and immunities incident to a corporation; may acquire by purchase or otherwise, and hold, convey, sell, and lease property and estates, either real or personal or mixed; may make, have, and use a common seal, and alter or renew the same at pleasure; may sue and be sued, plead and be impleaded, answer and be answered; defend and be defended against, contract and be contracted with, and shall never set up the defence of usury to any contract in any court, and generally may do and perform all and singular the acts and matters which shall be necessary and conducive to the well-being of said corporation.

Route of said railroad.

SEC. 2. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, change the location of, reconstruct, maintain, and operate a railroad with one or more tracks or lines of rails on such route, and with such alignment and graduation as said company shall think proper, from Stillwater, by way of Saint Paul and Saint Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood River, with a branch from Saint Anthony via Anoka, Saint Cloud and Crow Wing, to Saint Vincent, near the mouth of the Pembina River.

Power to appropriate land.

SEC. 3. The said corporation shall have the right to enter upon any lands for the purpose of making surveys, and for the right of way, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width throughout the entire length of its said railroads, may enter upon and take possession of, and use all and singular any lands, streams, and materials of every kind beyond the width of two hundred feet, for the location and construction of depots and stopping stages, station-grounds and houses, and for the purpose of constructing bridges, dams, embankments, excavations, spoil-banks, turn-outs, engine-houses, shops, and other buildings necessary for the constructing, completing, altering, maintaining, preserving, and complete operation of said railroads; all such lands, waters, materials, and privileges belonging to the Territory, or future State, of Minnesota, are hereby granted to said corporation for said purposes; and this act

shall be sufficient notice to all persons claiming any interest in the same, but lands owned or belonging to any person, company, or corporation, may be taken and appropriated for the purposes aforesaid, and shall be valued and paid for in the manner hereinafter provided.

Capital stock, how subscribed and how forfeited.

SEC. 4. The capital stock of said corporation shall be five millions of dollars, divided into shares of one hundred dollars each, which shall be deemed personal property, and may be issued and transferred in such manner and at such places as may be ordered and provided by the board of directors, who shall have power to require the payment of sums subscribed by the stockholders, of such amount, in such manner, at such times, and on such terms as they deem proper; and on refusal or neglect on the part of stockholders, or any of them, to make payment agreeably to such requisitions, the share or shares of such delinquents may, after thirty days' public notice, be sold at public auction under such rules as said board of directors may prescribe, the surplus money, if any remain after deducting the payments due, with interest, and the necessary costs of sale, to be paid to such delinquent stockholder. The board of directors, hereby appointed, shall cause books to be opened for the subscriptions to said stock in the city of Saint Paul, upon the acceptance of this charter, of which notice shall be given by publication in two or more newspapers published in Saint Paul, and in one or more published in Saint Anthony, and said books shall remain open ten days thereafter, and the said directors may thereafter also cause books to be opened in such manner and at such other places and times as they shall direct, and may, from time to time, increase the capital stock to an aggregate amount, not exceeding twenty millions of dollars, whenever they may deem it expedient for the operations of said corporation to make such increase.

May be increased from $5,000,000 to $20,000,000.

Board of directors, how chosen.

SEC. 5. All the affairs of said corporation shall be managed by a board of fifteen directors, who shall be stockholders, and a majority of whom shall be citizens of the Territory, and who are hereby invested with all the powers of said corporation. They shall be chosen annually by ballot, by the stockholders, at the annual meeting of the company, which shall be held on such notice and at such time as shall be prescribed by the by-laws, and at such place as shall be prescribed by the board of directors, and stated in such notice. The votes shall be delivered in person or by proxy, duly authorized, and in all cases in which stockholders shall vote, each share of stock shall be entitled to one vote, and in all elections for directors, those stockholders, equal to the number to be elected, having the greatest number of votes shall be deemed and declared duly elected. The elections shall be conducted in such manner as shall be prescribed by the by-laws of the company, and if, from any cause, an election of directors shall not be had at the time when, by the provisions of this act, or by the by-laws of said corporation it should be had, the same may be held at any other time, on notice to be given as aforesaid; and until such election be had the directors of the preceding year shall continue to act, and the corporation hereby created shall not forfeit nor lose any of its privileges, franchises, or immunities by reason of the irregularity or want of such election.

Members of first board of directors.

SEC. 6. The following-named persons are hereby appointed and shall constitute the first board of directors, whose term of office shall continue until an election shall be held and their successors duly elected as herein provided, viz: F. R. Delano, William Willim, Alex. Ramsey, Edmund Rice, R. R. Nelson, William

L. Ames, Richard Chute, Henry T. Wells, Abraham M. Fridley, Dwight Woodbury, Franklin Steele, S. B. Lowry, J. D. Crittenden, Charles H. Oakes, Daniel Bassett, whose duties and powers shall commence and be in force from and after the passage of this act.

By-laws of the company.

SEC. 7. The said company shall have power to make, ordain, and establish all such by-laws, rules and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well-ordering, regulating, and securing the affairs, business, and interests of the company: Provided, that the same be not repugnant to the Constitution and laws of the United States, or the laws of this Territory; and the board of directors shall have power to es-

Rates of toll.

13 tablish such rates of toll and charges for the conveyance of persons and property upon its said railroads as they shall from time to time direct and determine, and to change the same, and to levy and collect the same for the use of the said company. The

Width of track, &c.

width of track shall be four feet eight and a half inches, and the iron used in the track shall be of approved quality and pattern, and the railroad shall be completed, furnished, and equipped in a style and of a quality equal to the average of other first-class western railroads. The construction of wheels, the form and size of cars, the weight of loads, the rate of speed, terms of running, connections with other railroads, and all other matters and things respecting the use of said railroads shall be in conformity to such rules and regulations as said board of directors shall, from time to time, determine and

Railroad crossings.

establish: Provided, that at all crossings of the track of said railroad or branch with the track of any other railroad, the engine or cars arriving at such crossing shall come to a dead halt or stop before crossing the same. The said company shall have the right and authority to construct their said railroad and branches upon and along, across, under or over any public or private highway, road, street, plank-road or railroad, if the same shall be necessary; but the said company shall put such highway, road, street, plank-road or railroad in such condition and state of repair as not to impair or interfere with its free and proper use; and the said company shall have the right and

Bridges.

authority to erect and maintain all the necessary bridges for the use of their said railroad over any stream of water or water-course, at such points of crossing the same as they may locate the said road or branches, with all necessary abutments, piers, or other foundations; and said company shall have power to connect the said railroad or branches with any other railroad or branch

Connections with other roads.

thereof in this Territory or State, or in the State of Wisconsin, and to operate the same in connection with such other railroad or branches, under such name and on such terms as may be agreed upon by and between said companies, or to purchase from

Organization of board of directors.

any other railroad company the whole or any part of any railroad or branch railroad owned by such company.

SEC. 8. A majority of the board of directors shall constitute a quorum for the transaction of business, and shall meet at such times and places, and be convened in such manner as they shall decide upon; shall

14 elect one of their own number to be president, and one to be vice-president. The president shall, when present, preside at all the meetings of the board and of the stockholders, and when absent the vice-president shall discharge the duties of president,

Officers.

and in case of the absence of president and vice-president, the directors may appoint a president pro tem., who shall have

power to constitute an executive committee, and prescribe its powers and duties; to appoint a secretary, treasurer, and such engineers, superintendents, agents, and other officers as they may deem necessary; fix their compensation, and demand adequate security for the faithful discharge of their duties, and fill any vacancy which may occur in their own board.

Certificates of stock, how issued and transferred.

SEC. 9. The directors shall issue certificates to the stockholders for the number of shares subscribed for or held by them respectively in such corporation, signed by the president and secretary, subject, however, to all the payments due and to become due thereon, which stock shall be transferable on the books of said company, in such manner and under such regulations as shall be provided by the by-laws of the company.

Annual statement by directors to stockholders.

SEC. 10. At each annual meeting of the stockholders the directors shall make a full exhibit and statement of the affairs of the company and of their proceedings during the previous year; and special meetings of the stockholders may be called by order of the board of directors, or by stockholders holding one-fourth in amount of the capital stock, on like notice as that required for annual meetings, specifying the object of the meeting,

Special meetings of stockholders.

and no business shall be transacted at such special meeting except such as shall be particularly set forth in such notice, nor any vote taken unless a majority of all the stock of said company shall be then and there represented in person or by proxy.

Authorized to borrow money, issue bonds, &c.

SEC. 11. The said company is hereby authorized and empowered, in its corporate capacity, to borrow any sums of money from any person or persons, corporation or body-politic of any kind, and for any rate of interest which may be agreed upon by and between said company and any person or party of whom such loan may be obtained, any law on the subject of usury in this Territory or future State, or any State where such transaction may be made, to the contrary notwithstanding; and to make, execute, and deliver all necessary writings, notes, bonds, mortgages, or other obligations and securities, in amount and kind as may be deemed expedient by said corporation, in consideration of any such loan, or in discharge of any liabilities which it may incur in the construction, repair, equipment, or operating of said road; and the powers of the said company for the purposes aforesaid, and for all purposes necessary to carrying out the object of said company, are hereby ratified and confirmed, and the contracts and official acts of said company declared binding in law and equity upon said company and upon all other parties to said contracts.

Acceptance of charter by company.

SEC. 12. If said company shall not, within ten days from the passage of this act, accept the same by resolution, to be duly passed by the board of directors, and a certified copy thereof filed in the office of the secretary of the Territory, then the same shall be null and void, and, if accepted, then the said company shall, within fifteen months from the first day of September next, grade and complete ready for the iron all that portion of said railroad from Stillwater, by way of Saint Paul, to Saint Anthony, and within nine months thereafter put in actual operation said road from Stillwater, by way of Saint Paul, to Saint Anthony, and thereafter the work on said line of railroad and branch shall be completed and put in operation at the rate of not less than thirty miles in each year, and within ten years from the third day of March, 1857, the whole of said railroad and branch mentioned in said act of Congress, and hereby

Other conditions of charter.

authorized to be constructed by said company, shall be completed and in actual use.

Appropriation of private property for use of corporation. Power and mode of procedure.

SEC. 13. Whenever the line of said railroad and branches, or any part thereof, shall be located and its route determined, the said company may apply to the supreme, district, or county court in session, or any judge thereof in vacation, for the appointment of three commissioners to make an appraisal and award of the value of any and all lands which are the private property of any person on the line of said railroad and branches, or any division or part thereof, which shall be designated in such application, and which the said company shall have entered upon, possessed, occupied, or used, or which it may thereafter enter upon, take, possess, occupy, or use, for any of the purposes for which, by this act, the said company is authorized to enter upon, take, possess, occupy, or use lands. The said company shall give notice of its intention to apply for the appointment of such commissioners, by publish-

16 Appropriation of private property for use of corporation. Power and mode of procedure.

ing the same at least ten days before the time for hearing such application in at least one newspaper published in the county in which such land shall be; but in case no newspaper be published in such county, then in a newspaper published in the city of Saint Paul, and upon an affidavit of the publication of the same, the court or judge to whom the application shall be made shall appoint three commissioners, who shall have cognizance of all cases arising on the line or route of said railroad and branch, or any division or part thereof, which shall be designated by said company in such application, and they shall proceed to examine the premises in each case separately, having first given such notice as they may deem reasonable to such owner, guardian, or husband, and at least five days' personal notice to such owner, if resident in the county; and whenever it shall appear to said company or its officers that the title of such land is in dispute, or that several parties claim interest therein, by tax-sales, tax-titles, incumbrances, liens, or equitable claims, the said commissioners shall, upon request of said company or its officers, give notice to all persons claiming any interest in such land, whether as owners, incumbrancers, or otherwise, and when the person to be notified has no known residence in this Territory or State within the knowledge of such commissioners, the notice may be by publication in a newspaper for such length of time as the commissioners shall deem reasonable; and, after making such examination, the said commissioners, or a majority of them, shall, in each case separately make an appraisement and award of the value of the land so entered upon, taken, possessed, occupied, or used by said company for any of the purposes aforesaid, at the time when the same was so entered upon and taken, and shall deliver one copy of their award in each case to the said company, and shall file another in the office of the clerk of the circuit or district court of the county in which said lands shall lie, or of the county to which such county shall be attached for judicial purposes, with the costs of the award taxed upon each of said copies; and if neither party shall appeal from said award in the manner hereinafter provided, the said circuit or district court on motion of the party in whose favor any award shall be made, for such value as aforesaid, unless such award shall have previously been paid, shall enter up judg-

17 Appropriation of private property for use of corporation. Power and mode of procedure.

ment in conformity with such award; and in case either of said commissioners shall die, resign, or decline to act, the supreme, district, or county court or judge shall appoint another commissioner in his stead, and the said

company, or any party receiving notice from the said commissioners as aforesaid, may within thirty days after such award shall have been filed with the clerk, as aforesaid, appeal from the same to the circuit or district court for the county in which such award shall be filed, by filing with the clerk of said court a written notice of such appeal, and upon receiving such notice the said clerk shall enter the appeal as a case upon the docket of said court, setting down the owner or owners, and person or persons claiming any interest in said land, embracing all persons so having received such notice from said commissioners, as plaintiff, and the said company as defendants, and the said court shall proceed to hear and determine such case in the same manner that other cases are heard and deermined in such court, and all issues of fact arising therein shall be tried by a jury, unless a jury be expressly waived by both parties, but the appellant shall not be entitled to have the case tried at any term of said court unless he shall have given notice to the appellee or his attorney, at least ten days before the first day of the term, that he will demand a trial at such term; but in case the appellee has no known residence in this Territory or State, or attorney of record residing therein, no such notice need be given; but in all cases the appellee may waive such notice, in which case the same rule for trial shall be applicable to it as to other cases in said court. After the hearing of such case, the jury, or if a jury be waived, the court, shall assess the value of the lands so entered upon, taken, possessed, occupied, and used, by said company, at the time when the same was entered upon and taken, and after such assessment the court shall proceed to render judgment against said company for the amount of said assessment in favor of the plaintiff or plaintiffs, in such case, and if the amount so assessed in favor of the said plaintiff or plaintiffs shall exceed the amount awarded by said commissioners with interest at the rate of twelve per cent. per annum from the time of such award and the time of such assessment by the jury or court, then judgment shall be rendered against said company for costs; and when the appeal shall be taken by the claimant, and it shall not exceed such mount and interest as aforesaid, then judgment shall be rendered in favor of said company
18 for costs; and against the said plaintiff or plaintiffs, and execution may issue accordingly. Either party shall be entitled to a change of venue for the trial of such cause, on affidavit filed, stating the belief of the affiant that a fair trial cannot otherwise be had; the change of venue shall be to the nearest county where a fair trial can be had. The judgment of the said court may be reviewed, on writ of error, as other cases at law. Whenever the commissioners shall make an award as aforesaid, and no appeal shall be taken from the same, or whenever in case of appeal a final judgment shall be rendered, it shall be the duty of the company, and not before, to pay to the party entitled to the same the amount of said award or judgment; and in any case where there shall be any lien, incumbrance, tax-sale, tax-title or equitable claim to or upon the land or any part thereof, which is the subject-matter of such award or judgment, or when more than one person shall be entitled to or shall set up any claim to the amount of such award or judgment, or any part of it, or when the person entitled to receive the same shall not have any known residence within the Territory or State, the said company may deposit the amount of such award, when there is no appeal, with the clerk of the court with whom the award in the case shall have been filed; and in case of an appeal and judgment thereon, the company may deposit the amount of such judgment with the clerk of the court in which such judgment shall have been

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rendered, and the money so deposited in either case shall be paid over by order of the court to the person or persons who shall be adjudged by the court to be entitled to receive the same; and whenever the amount of such award or judgment shall have been paid, or tendered, or deposited as aforesaid, an absolute estate in fee-simple in such lands shall be and become vested in the said company, as against all persons so receiving notice from the said commissioners as aforesaid, and all such persons so having received such notice shall be forever concluded from questioning such title so acquired by the said company; and the said company shall have full power and authority, after entering upon and taking any such lands, to have, hold, possess, occupy, use, and enjoy the same for any of the lawful purposes of the said company, from the time of such entry and taking until the proceedings contemplated by the act shall have been finally determined, and until said company shall have refused, after demand made, to pay the value of said land so ascertained as aforesaid; and they shall not during such time, nor until such refusal, be disturbed in such possession or occupancy, use or enjoyment, by any proceedings either in law or equity.

SEC. 14. If any person shall wilfully or knowingly injure or destroy any part or portion of the railroads so to be constructed, or any works, building, or machinery attached to or in use upon the same belonging to said company, or shall wilfully and maliciously place any obstruction or thing upon the track of said railroad, such person or persons so offending shall each of them, for every such offence, forfeit and pay to said company three times the amount of damages caused by such offence, which may be recovered in the name of said company, by action of debt, in any court having competent jurisdiction, and shall also be subject by indictment, and on conviction of any such offence shall be punished by fine and imprisonment, not exceeding ten years in the State prison, or either, at the discretion of the court; and in case any accident shall occur in consequence of any such obstruction or damages to said road or machinery, whereby the death of any person shall be caused, the person so offending shall, on conviction, be adjudged guilty of murder in the first degree, and punished accordingly, in such manner as shall be prescribed by the statutes for the punishment of murder in the first degree.

Wanton mischief to road defined and how punished.

SEC. 15. The property of every person vested in the stock of said company, shall be liable to be taken in execution for the payment of his or her debts, in such manner as is or may be provided by law; but no tax shall ever be levied on the stock-shares of said company, except the yearly payment to be made by said company, as herein provided, and the shares held by any stockholder when taken in payment of any other debt or liability of such stockholder, shall be subject to all indebtedness and claims of every kind in favor of said company, against the holder of said stock, which indebtedness and claims shall be fully paid, before said company shall be required to transfer said stock to any purchaser thereof, and before any such purchaser shall acquire any right or title thereto.

Shares of stock liable to execution.

Subject to lien of company.

SEC. 16. For the purpose of aiding in the construction of the railroads hereby authorized, all the interest and estate, present and prospective, of this Territory, and of the future State which shall succeed it, in or to any or all the lands granted by the Government of the United States to the Territory of Minnesota for the purpose of aiding in the construction of a railroad from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of

Grant of lands donated by Congress on Minnesota & Pacific Railroad.

Sioux Wood River, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, to the point hereinbefore mentioned, agreeably to the terms of an act of Congress entitled "An act making a grant of land to the Territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State," approved March 3d, 1857; together with all and singular the rights, privileges, and immunities conferred or intended to be conferred by said act of Congress, are hereby granted to said Minnesota and Pacific Railroad Company, conditioned that said land shall be exclusively applied to the construction of that road for which it was granted; and provided that the title of said land shall vest in the said Minnesota and Pacific Railroad Company, in the manner following, that is to say: Whenever twenty or more continuous miles of said road shall have been located, the governor of the Territory or future State shall certify the same to the Secretary of the Interior, and thereupon the title to one hundred and twenty sections of said lands shall vest in the said company; and when twenty continuous miles of said road shall have been completed so as to admit of running regular trains on the same, the governor shall certify the same to the Secretary of the Interior, and thereupon a further quantity of one hundred and twenty sections of said lands shall vest in said company, until said roads are completed; and it shall be the duty of the governor so to certify to the Secretary of the Interior whenever any such twenty miles are completed, so as to admit of running regular trains of cars over the same, and the governor shall, in his official capacity, and on behalf of the Territory or State, and under the great seal thereof, execute and deliver to the said Minnesota and Pacific Railroad Company, whenever it shall, by virtue of the provisions of this act, be entitled to any of said lands, a deed in fee-simple of any and all of the lands to which said company shall be entitled.

Conditions of grant.

21

SEC. 17. The location and designation of the route and line of said railroad and branch shall be made by said company, and reported to the governor from time to time, and as fast as the same shall be definitely located and established, and the selection of the lands provided for by the act of Congress aforesaid shall be made as soon thereafter as practicable by said company, or such agents as it may designate, under the appointment of the governor of the Territory or future State of Minnesota; such selections, as well as the survey of said roads, and the compensation of such agents, shall be at the cost and charge of said company without charges of any kind upon the Territory or future State, and said railroads so constructed by the application of the proceeds of the lands hereby granted shall be and remain public highways for the use of the Government of the United States, free from any toll or other charge upon the transportation of troops and military property of the United States; and the United States mail shall be transported over said road and branch, under the directions of the Post-Office Department, at such price as Congress may by law direct: Provided, That until such price is fixed by law of Congress, the Postmaster-General shall have power to determine the same.

Location of routes.

Selections of lands.

22

Use of roads by Government of United States.

SEC. 18. In consideration of the grants, privileges, and franchises herein conferred on the said Minnesota and Pacific Railroad Company, the said company shall and will, on or before

Taxation by Territory or State of Minnesota.

the first day of March, in each year, pay into the treasury of the Territory or future State three per centum of the gross earnings of the said railroad, for the year ending on the last day of the preceding December, in lieu of all taxes and assessments whatever; and for the purpose of ascertaining the said earnings, an accurate account shall be kept by said company of all receipts and expenditures on account of the operation of said railroads, and abstracts thereof shall be furnished by said company to the treasurer of the Territory or State, on or before the first day of February in each year; the truth of which shall be verified by the affidavits of the secretary and treasurer of said company; and for the purpose of ascertaining the truth of said affidavits and the correctness of such abstracts, full power is vested in the governor, or any other person appointed, as may be by law prescribed, to examine the books and papers of said company, and to examine, under oath, the officers, agents, and employees of said company, and other persons, and if any person, so examined by the governor, or authorized person, shall knowingly and wilfully swear falsely concerning the matters aforesaid, every such person is hereby declared to have committed perjury; and for securing to the
23 Territory or State the payment of the aforesaid per centum, it is hereby declared that the State shall have a lien upon the railroads of the said company, and upon all other property, estate, and effects of the said company, whether real, personal, or mixed; and the lien hereby secured shall take and have precedence of all demands, decrees, and judgments against the said company. The first payment shall be made on the first day of March next, after fifty miles of said railroad shall be completed, and such payment shall be in lieu of all taxes, and in full of all claims of the Territory or State, for the grant hereby made; and in consideration of such annual payments the said company shall be forever exempt from all assessments and taxes whatever by the Territory, or State which shall succeed the Territory, or by any county, city, town, village, or other municipal authority, in the Territory or State, upon all stock in the said Minnesota and Pacific Railroad Company, whether belonging to said company, or to individuals, and upon all its franchises or estate, real, personal, or mixed, held by said company, and said land granted by said act of Congress hereby authorized to be conveyed to the said Minnesota and Pacific Railroad Company shall be exempt from all taxation till sold and conveyed by said company.

Company authorized to transport by water, to collect tolls and build vessels.

SEC. 19. The said Minnesota and Pacific Railroad Company shall have full power and authority to transport persons and property in boats, vessels, barges, or other water-craft, on any navigable water which any portions of its railroads may run to or connect with, and to receive and collect such tolls and charges therefor as said company shall from time to time fix and determine; and for that purpose may purchase, build, and own such vessels, boats, and barges, or other water-craft, as it may require.

May take and dispose of lands, &c.

SEC. 20. The said Minnesota and Pacific Railroad Company shall be capable in law of taking and holding any lands granted by the Government of the United States or of this Territory, or of the future State, or by other parties, which shall be conveyed to it by this act, or by deed, gift, or purchase, or by operation of law, and may mortgage, pledge, sell, and convey the same, or otherwise
24 dispose of all their right, title, interest, claim, or demand of, in, and to any such lands so granted to said company, and in any other estate, real, personal, or mixed, of which said company may be seized, or which it may acquire subsequently thereto, in such manner and on such terms as the directors may think proper.

May execute bonds and secure same by mortgage on roads or lands or deeds of trust.

SEC. 21. The said company is hereby authorized and empowered, in its corporate capacity, to make, execute, issue, and deliver its bonds and obligations in any amount which the directors may deem necessary or expedient: Provided, That the faith of the Territory or future State of Minnesota shall be in no wise pledged for the redemption of said bonds, and that no banking-privileges are hereby granted to said company. And the directors of said company are hereby authorized and empowered to prescribe the sum or sums for which each of said bonds shall be issued, the time or times and place or places when and where the principal and interest of the same shall be payable, the person or persons, trustee or trustees, or corporation to whom they shall be payable, and whether payable to order or to bearer, or how otherwise negotiable, the rate of interest which said bonds shall bear, and the manner and form in which the interest coupons annexed to them shall be executed; and to secure the payment of all or any of said bonds, the said company is hereby authorized and empowered in its corporate capacity to make, execute, and deliver one or more mortgages or deeds of trust upon the whole or any part of its railroad or branches, constructed or authorized to be constructed, and of the estate granted by this act, and any or all other of their estate, real, personal, or mixed, in possession or expectancy; and said company is also hereby empowered and authorized in and by such mortgage or deed of trust to confer upon the trustee or mortgagee full and ample powers to enter into and upon, and to take possession of, have, use, and employ, or to sell or dispose of, the whole or any part of said railroad and branches, and all corporate and other franchises, rights and privileges, of the said company; and in case of any such sale, to grant and convey to the party or parties acquiring title under any such sale, and their associates, successors, and assigns, all and the same rights, privileges, grants, franchises, immunities and advantages, in and by such mortgage or deed of trust enumerated and conveyed, which belonged to and were enjoyed by the said company, as fully and absolutely in every respect as the said company, its stockholders, officers, and agents, might or could have done if such sale or foreclosure had not taken place.

May authorize trustee to take or sell mortgaged premises.

Directors may prescribe form and terms of mortgage; may create a sinking-fund.

And the directors of said company are hereby authorized and empowered to prescribe, by resolution to be by them adopted, all matters relating to the form and terms of any such mortgage or deed of trust, and of its execution and delivery; and they are authorized to provide for the periodical payment to such trustee or receiver as they shall appoint a certain sum to create a sinking-fund, with which to pay off and discharge, at or before maturity, all or any of the bonds by them authorized to be issued, and also to provide the manner in which such trustee or receiver shall pay out or dispose of said sinking-fund, and to authorize him to designate by lot, or any other suitable manner, the bond or bonds to the payment of which such sinking-fund or any part thereof shall be applied; and the said company is hereby fully authorized and empowered, by its agent or brokers, or otherwise, at any place, to sell, loan, pledge, hypothecate, or otherwise dispose of any or all of the aforesaid bonds hereby fully authorized to be issued, at par, or at any price less than par, and for such sum or sums, and on such terms as to the said company, or its agent or brokers, shall appear most for the interest of said company. And any such mortgage or deed of trust, and every discharge or satisfaction thereof, may be recorded in the office of the secretary of the Terri-

How mortgage or deed of trust recorded.

tory or future State of Minnesota, in a proper book kept for that purpose, and the certificate of such recording endorsed on such mortgage or deed of trust shall have the same effect as if recorded in the several counties through which such road may run, or in which such land may be, and such record in the office of the secretary shall be sufficient notice to all persons.

Property taken by company to be for public use.

Sec. 22. All the property which the said Minnesota and Pacific Railroad Company is authorized to take, possess, hold, use, or enjoy, by making payment therefor, as in this act provided, is hereby declared to be taken for public use, so soon as the said company shall so take, possess, hold, or use the same.

Badges of conductors &c.

Sec. 23. Every conductor, baggage-master, engineer, brakeman, or other servant of such corporation, employed in a passenger-train or at stations for passengers, shall wear upon his hat or cap a badge, which shall indicate his
27 office, initial-letters, or style of the corporation. No conductor or collector, without such badge, shall demand or be entitled to receive from any passenger any fare, toll, or ticket, or exercise any of the powers of his office, and no other of said officers or servants, without such badge, shall have any authority to meddle or interfere with any passenger, his baggage or property.

Bells.

SEC. 24. A bell of at least thirty pounds' weight, or a steam-whistle, shall be placed on each locomotive-engine, and shall be rung or whistled at the distance of at least eighty rods from the place where said road shall cross any other road, and be kept ringing or whistling at intervals until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by said corporation, one-half thereof to go to the informer, and the other half to the Territory or future State of Minnesota, and to be liable for all damages by reason of such neglect. Said corporation shall cause boards to be placed, well supported by posts or otherwise, and constantly maintained, across each public road or street where the same is crossed by the railroad, on such elevation as not to obstruct the travel, and to be easily seen by travelers, and on each side of said board shall be painted in capital letters, of at least the size of nine inches each, the words, "Railroad crossing! Look out for the cars!" But this provision shall not apply to streets of cities or villages, unless the corporation be required to put up such boards by the officers having charge of such streets. Said company shall construct and maintain a good, substantial board or rail fence, four and one-half feet high, along said railroad, in the line of the lands by this act granted to them, and shall construct and maintain cattle-guards, wherever the same may be necessary, sufficient to keep cattle, sheep, horses, and hogs from off the track of said railroad, whenever required by the board of county commissioners of the counties respectively through which said road shall pass, and shall be liable for all damages sustained by any person by reason of neglect to keep and maintain such fence or cattle-guard in good repair.

Notice of railroad-crossing.

Fences.

Repealed.

Power to construct Mississippi Valley road and extension to Missouri River.

SEC. 25. Said company is hereby authorized, and shall have full power, to locate, construct, and operate a railroad, with one or more tracks, from Winona up the Valley of the Mississippi River to Saint Paul, and to extend its line
28 of railroad from its terminus at a point between the foot of Big Stone Lake and the mouth of Sioux Wood River to any point on the Missouri River north of the forty-fifth parallel of north latitude,

and to increase its capital stock equal to the full cost of said railroad and extension.

Magnetic telegraph.

SEC. 26. Said company shall also have power and authority to construct and operate a line of magnetic telegraph along any or all its railroads or branches in this Territory or future State of Minnesota.

Consolidation with foreign companies.

SEC. 27. The Minnesota and Pacific Railroad Company shall not at any time consolidate with any railroad company owned or operated outside the Territory or State of Minnesota, without the authority of the legislature of said Territory or State. All the railroads in this Territory shall be of uniform *guage* or width of tracks, which shall be and is hereby established at four feet and eight and one-half inches.

Uniform *guage*.

Nature of act.

SEC. 28. This act is hereby declared to be a public act, and shall be favorably construed to effect the purposes hereby intended, and copies thereof, printed by authority of the Territory or State of Minnesota, shall be received as evidence thereof in all cases.

To take effect immediately,

SEC. 29. This chapter one of this act shall take effect and be in force from and after the passage of this act.

CHAPTER II.

SECTION 1. The Transit Railroad Company is hereby authorized and empowered to survey, locate, construct, complete, and perpetually to have, use, maintain, and operate the Transit Railroad, with one or more tracks or lines, from the city of Winona, on the most direct and feasible route, by way of St. Peter, to the Big Sioux River, south of forty-fifth parallel of north latitude; and shall have, possess, exercise, and enjoy by the same rights, privileges, functions, franchises, authority, and immunities, (with reference to the said route or any railroad to be built thereon,) and there is hereby conferred upon the Transit Railroad company all the power and authority contained in the charter of said company, passed by the legislative assembly of the Territory of Minnesota, entitled "An act to incorporate the Transit Railroad Company," approved March 3d, 1855, for the purpose of carrying out the
29 object of this act, and of appropriating and applying the lands hereinafter in this act granted, or their proceeds, to aid in the construction of railroads by this act authorized to be built; and the whole of the railroad, or said road hereby authorized to be constructed, shall be constructed by said Transit Railroad Company within ten years from the third day of March, A. D. 1857. The Transit Railroad Company shall never set up the defence of usury to any contract in any court whatsoever.

SEC. 2. For the purpose of aiding in the construction of the railroad which by this act the Transit Railroad Company is authorized to construct, all the interest and estate, present and prospective, of this Territory and future State, in or to any and all the lands granted by the Government of the United States to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad from Winona, via St. Peter, to the Big Sioux River, south of forty-fifth parallel of north latitude, by virtue of an act of Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State," approved March 3d, 1857,

together with all and singular the rights, privileges, and immunities conferred or intended to be conferred upon said road, by the said act of Congress, are hereby granted to and vested in the said Transit Railroad Company: Provided, That the said lands shall be exclusively applied to and used by said Transit Railroad Company in the construction of a railroad from Winona, via St. Peter, to a point on the Big Sioux River, south of the forty-fifth parallel of north latitude, and shall be disposed of only in the manner prescribed in said act of Congress, approved March 3d, 1857, and shall be applied to no other purpose whatsoever.

SEC. 3. The location and designation, and any change or alteration of the route and line of said railroad, shall be made by the Transit Railroad Company, and the same shall from time to time, and as fast as practicable, be reported to the governor of the Territory or future State of Minnesota. The selecting of lands provided for in the act of Congress hereinbefore mentioned, and herein vested in said Transit Rail-
30 road Company, shall be made by such agent or agents as shall be appointed by the governor of this Territory or future State of Minnesota, who is hereby required to appoint the same upon the request of the said company; compensation of such agents shall be at the cost and charge of said company, without charge of any kind upon the treasury of this Territory or future State of Minnesota; said railroad which shall be constructed by the application of funds derived from the lands herein granted shall be and remain a public highway upon the transportation of property or troops of the United States; and the United States mail shall be transported over said railroad under the direction of the Post-Office Department, as provided in said act of Congress.

SEC. 4. The said lands so granted shall be and are exempted from all taxation until the same shall have been sold and conveyed by said company. In consideration of the grant of land and other franchises and privileges hereby confirmed in and conferred on the Transit Railroad Company, the said company shall pay into the treasury of the Territory or State of Minnesota three per cent. upon all the gross earnings of the said road, the amount of the gross earnings to be ascertained by the verified statement of the president and treasurer of said company, as hereinbefore provided for; and the said three per cent. shall be so paid into the treasury of the Territory or future State of Minnesota within sixty days after any portion of the said road shall be opened, and annually thereafter; and the same, when paid, shall be in lieu of all taxes whatever.

SEC. 5. The said Transit Railroad Company shall have full power and authority to transport persons and property in boats, vessels, and barges, or other water-craft, on any navigable stream or water which their said road may run to or connect with, and to collect and receive reasonable compensation for the same; and for that purpose may purchase or hold and own such vessels, boats, or other craft as may be required for the purpose aforesaid.

SEC. 6. The said Transit Railroad Company shall be capable in law of taking and holding any lands granted by the Government of the United States, or of this Territory or future State of Minnesota, to aid in the construction of railroads, which shall be conveyed to said
31 company by this act, or by deed, in fee-simple, or any lesser estate, or by operation of law. And they may also borrow money, issue bonds or other evidences of debt to secure the same, and may also mortgage or pledge, or otherwise dispose of all their right, title, claim, or demand of, in, or to any lands or interest in lands granted to said company by this act, and in any other estate, real, personal, and mixed, of

which they may be seized at the time of execution of such mortgage, or which they may acquire subsequent thereto, in such manner and on such terms as the directors may think proper.

SEC. 7. Whenever any twenty continuous miles of said railroad shall be completed, it shall be the duty of the governor of this Territory or future State to certify that fact to the Secretary of the Interior, and so from time to time, as often as twenty more continuous miles of road shall be completed.

SEC. 8. The Root River Valley and Southern Minnesota Railroad Company shall have at all times the right to send passengers and freight over the Transit Railroad at as low rates and charges per mile as the said Transit Railroad Company may charge over any portion of their said road.

SEC. 9. Said Transit Railroad Company shall have full power and authority to extend its line of railroad from its terminus on the Big Sioux River to any point on the Missouri River south of the forty-fifth parallel of north latitude.

SEC. 10. This chapter two of this act shall take effect and be in force from and after the passage of this act.

CHAPTER III.

SECTION 1. The Root River Valley and Southern Minnesota Railroad Company are hereby authorized and empowered to survey, locate, construct, and complete, and perpetually to have, use, maintain, and operate a railroad, with one or more tracks or lines, from La Crescent, via Target Lake, up the valley of Root River to a point of junction at Rochester, (with a railroad from Winona, via St. Peter, to a point on the Big Sioux River south of the forty-fifth parallel of north latitude,) east of range seventeen, in the Territory of Minnesota: Provided, The
32 last-mentioned railroad is operated and constructed by way of Rochester, in accordance with the act of incorporation of said Root River Valley and Southern Minnesota Railroad Company, approved March 2d, 1855, and all subsequent amendments thereto.

SEC. 2. The said Root River Valley and Southern Minnesota Railroad Company are hereby authorized and empowered to survey, locate, construct, complete, and perpetually to have, use, maintain, and operate a railroad with one or more tracks or lines, from St. Paul and St. Anthony, via Minneapolis, to a point of junction at Shakopee City, in the county of Scott, and thence, via Belle Plain, Clarksville, Le Sueur, Traverse de Sioux, St. Peter, Kasota, Mankato, and South Bend, to the southern boundary of the Territory of Minnesota, in the direction of the mouth of the Big Sioux River, and for these purposes shall have, possess, exercise, and enjoy the same rights, privileges, and immunities with reference to the said routes, or any route of railroad in this act provided for, or any railroad to be built thereon, as it now possesses and enjoys with reference to the roads described in the act of incorporation of said company, and the amount thereto.

SEC. 3. All the lands, interest, rights, powers, and privileges granted to and conferred upon the Territory of Minnesota, in and by virtue of an act of Congress approved March 3d, 1857, entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State," applicable to the said roads or lines above mentioned, are hereby disposed of and con-

ferred to and upon the said Root River Valley and Southern Minnesota Railroad Company, subject to the provisions hereinafter set forth, and the provisions of the act of Congress aforesaid.

SEC. 4. The whole of said railroads herein authorized and required to be constructed shall be completed by the said Root River Valley and Southern Minnesota Railroad Company within ten years from the 3d day of March, A. D. 1857, and that portion of the road aforesaid from St. Paul to St. Peter, and from St. Anthony, via Minneapolis, to the point of junction at Shakopee City, shall be completed within four years from the first day of January, A. D. 1858: Provided, That that
33 portion of the road from St. Anthony, via Minneapolis, to the point of junction shall be commenced and built as soon as that from St. Paul; and the said company shall never set up the defence of usury to any contract whatever.

SEC. 5. The said Root River Valley and Southern Minnesota Railroad Company are hereby authorized and required to construct a railroad, with one or more tracks, from a point of junction with the first-mentioned road at or near Hokah to the village of Brownsville, in the county of Houston, which branch road shall be completed within three years from the approval of this act: Provided, That nothing herein contained shall conflict with the said act of Congress, with the privilege of extending the said branch to the south line of the Territory of Minnesota, and the said Root River Valley and Southern Minnesota Railroad Company is hereby authorized and empowered to survey, locate, construct, and complete, and perpetually to have, use, maintain, and operate a railroad, with one or more tracks, from the western terminus of the railroad herein authorized to be constructed by the said company, (from St. Paul to the southern bound'ry of the Territory of Minnesota, in the direction of the mouth of the Big Sioux River, in a westerly direction to the Missouri River,) and for these purposes the said company shall have, possess, exercise, and enjoy the same rights, privileges, franchises, authority, and immunities with reference to the said routes so extended, or any railroads to be constructed thereon, as are granted to said company by their act of incorporation.

SEC. 6. The Minneapolis and Cedar Valley Railroad Company is hereby authorized to survey, locate, construct, complete, and perpetually to have, use, maintain, and operate, with one or more tracts, a railroad from Minneapolis, in the direction of Faribault, to a point of junction (with the aforesaid railroad from St. Paul to the southern boundary of the Territory of Minnesota) in the direction of the mouth of Big Sioux River, said point of junction to be in the county of Dakota, from one to six miles from Mendota, in a southerly direction; thence from said junction or crossing of the said railroad from St. Paul, via Faribault, to the south line of the Territory of Minnesota, west of range sixteen, and for that purpose shall have, possess, and enjoy and exercise the same rights, privileges, franchises, and immunities with reference to the said
34 route, or any railroad to be constructed thereon, as it possesses or enjoys in reference to the road described in the act of incorporation of said company, and all the lands, rights, powers, privileges, and interests granted to and conferred upon the Territory of Minnesota in and by virtue of this said act of Congress, approved March 3, 1857, entitled "An act making a grant of lands to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands to the State of Alabama to aid in the construction of a certain railroad in said State," applicable to the said road or route, shall be, and are hereby, disposed of, granted and

conferred to and upon the said Minneapolis & Cedar Valley Railroad Company, subject to the terms, conditions, and provisions hereinafter set forth and of the said act of Congress, and the whole of said railroad hereby authorized to be constructed by the said Minneapolis & Cedar Valley Railroad Company shall be completed within ten years from the 3d day of March, A. D. 1857, and the said company shall never set up the defence of usury in any contract whatever.

SEC. 7. For the purpose of aiding in the construction of the railroads which by this act the several railroad companies mentioned in this act are authorized to construct, all the interest and estate, present and prospective, of the said Territory and future State in or to any or all the lands granted by the Government of the United States to the Territory of Minnesota for the purpose of aiding in the construction of the roads herein set forth by virtue of the act of Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State," approved March 3d, A. D. 1857, together with all and singular the rights and immunities conferred or intended to be conferred upon said Territory by the said act of Congress, are hereby granted to and vested in said railroad companies, respectively: Provided, That the said lands shall be exclusively applied to and used by said railroad companies respectively in the construction of the aforesaid railroads, and shall be disposed of only in the manner prescribed in the said act of Congress.

SEC. 8. The location and designation and any change or alteration of the route and line of said railroad shall be made by the aforesaid railroad companies, respectively. And the same shall be from time to time, and as fast as practicable, reported to the governor of the Territory or future State of Minnesota. The selecting of lands provided for in the act of Congress hereinbefore mentioned, and herein vested in said companies, shall be made by such agent or agents as shall be appointed by the governor of this Territory or future State of Minnesota, who is hereby required to appoint the same. Compensation of such agents shall be at the cost and charge of said companies, without charge of any kind upon the treasury or future State of Minnesota. Said railroads which shall be constructed by the application of funds derived from the lands herein granted shall be and remain a public highway for the use of the Government of the United States, free from any toll or other charge upon the transportation of property or troops of the United States, and the United States mail shall be transported over said railroads, under the direction of the Post-Office Department, as provided in said act of Congress.

SEC. 9. The said lands so granted shall be, and are, exempt from all taxation until the same shall have been sold and conveyed by said companies. But so soon as the said companies shall have respectively constructed, equipped, and put in operation fifty miles of railroad for freight and passengers, the said companies shall severally pay into the treasury of the Territory or State of Minnesota, in lieu of all taxes whatsoever upon the property of said companies respectively, the sum of three per cent. per annum on the gross earnings of each of the said roads; said gross earnings to be ascertained by a statement under the oaths of the president and treasurer of the said roads, which statement shall be filed, on or before the first day of January in each year, in the office of the governor of the Territory or future State of Minnesota, said payments to be annually, within sixty days after the filing of the state

ments aforesaid, and the governor shall have the right to appoint a commissioner to examine the books and accounts of said company at any time.

SEC. 10. The said railroad companies shall have full power and authority to transport persons and property in boats, vessels, barges, and other water-crafts on any navigable river, stream, or water which
36 their said road may run to or connect with, and to collect and receive reasonable compensation for the same, and for that purpose may purchase and hold and own such vessels, boats, and other craft as may be required for the purpose aforesaid: Provided, however, The provisions of this section shall not interfere with or apply to the ferry-rights, privileges, and franchises heretofore granted by the legislature of this Territory.

SEC. 11. The said railroad companies shall be capable, in law, of taking and holding any lands granted by the Government of the United States or of the Territory or future State of Minnesota to aid in the construction of railroads which shall be conveyed to these companies by this act or by deed in fee-simple, or any lesser estate, or by operation of law. And they may also borrow money, issue bonds or other evidence of debt to secure the same, and may also mortgage or pledge or otherwise dispose of all their right, title, claim, or demand of, in, or to any lands granted to said companies, or either of them, by this act, and in any other estate, real, personal, or mixed, of which they may be seized at the time of the execution of such mortgage, or which they may acquire subsequent thereto, in such manner and on such terms as the directors may think proper.

SEC. 12. When any continuous twenty miles of either of said railroads shall be completed, it shall be the duty of the governor of this Territory or future State to certify that fact to the Secretary of the Interior, and so, from time to time, as often as twenty more continuous miles of said railroads are completed, and said lands shall become the property of the respective companies herein mentioned, in accordance with the provisions of the act of Congress making the grant of lands to the Territory of Minnesota, approved March 3d, 1857, heretofore referred to in this act.

SEC. 13. The Minneapolis and Cedar Valley Railroad Company shall at all times have the right to use the road, track, switches, depots, and grounds of the said Root River Valley and Southern Minnesota Railroad Company, from the junction of the aforesaid railroads to the city of St. Paul, with its engines, tenders, cars, and all carriages necessary or convenient for the transportation of freight and passengers, and by its servants and officers to fully and freely enter upon, occupy, and use the same in the transportation of its business to and from the said city of St. Paul, on such terms and conditions as shall be agreed upon
37 by the said companies; and in case the said companies shall not be able to agree in reference to said terms, either party may apply to the governor of the Territory or State, on ten days' notice, for the appointment of three disinterested persons, one of whom shall be an engineer, to decide upon the terms and conditions of such use, and the compensation to be paid for the use of said roads, tracks, and depots, as herein provided, and the award of the persons so appointed as aforesaid shall be final and conclusive.

And the said Minneapolis and Cedar Valley Railroad Company are hereby authorized, at any time, to build and construct from the said junction to the city of St. Paul, on the line or route and on the lands of the said Root River Valley and Southern Minnesota Railroad Company,

or any portion of the same, one or more separate tracks, with the necessary side-tracks, turnouts, switches, and other conveniences, and also to locate, build, and construct, from any other point on their said road, a like road to and from St. Paul, and from any point on said road a like road to Hastings, with all necessary side-tracks, turnouts, switches, depots, and other conveniences for the transportation of freight and passengers, and are hereby authorized to take, acquire, and hold, at St. Paul and elsewhere, all necessary depot-grounds and other real estate, in the same manner as provided in their act of incorporation. And it is also hereby further provided that all and singular the rights and privileges hereinbefore granted to the Minneapolis and Cedar Valley Railroad Company into and over the track, depots, and lands of the Root River Valley and Southern Minnesota Railroad Company, and also to construct another track on the lands of said company, be, and the same are hereby, granted and conferred to and upon the said Root River Valley and Southern Minnesota Railroad Company over the lands of the Minneapolis and Cedar Valley Railroad Company, in and to and over the line, route, and lands of the Minneapolis and Cedar Valley Railroad Company, from said junction, or any other point on their said line, to St. Anthony, upon the same terms and conditions, in all respects, as is hereby granted and provided for said Minneapolis and Cedar Valley Railroad Company, in, to, and over the lines of road, track, and lands of the said Root River Valley and Southern Minnesota Railroad Company.

38 SEC. 14. If it shall be found, after the selection of lands is made, that there is a greater quantity of land in proportion to distance included in the grant to the Root River Valley and Southern Minnesota Railroad, on the line of road to be constructed by said company from St. Paul and from St. Anthony, by way of Minneapolis, to the southern boundary of the Territory, as herein described, than on the line of road to be constructed by the Minneapolis and Cedar Valley Railroad Company, in proportion to the number of miles of route to be constructed by said company, the governor of the Territory or State, at the request of the company upon whose line the deficiency may exist, shall appoint an agent to select and set apart from the lands on the line of the road having such excess of quantity a sufficient amount of lands on such line, of average quality, location, and value, to equalize the quantity of lands to each company, it being intended that company are to equally share the lands granted on both lines, in proportion to the distance of roads to be constructed by each; and the lands so selected and set apart shall vest in and become the property of said company so entitled to receive them on the report of the commissioners as aforesaid, such selection and report being confirmed by the governor: Provided, That nothing herein contained shall be taken or construed to authorize the appropriation of any of the lands granted to the road from St. Paul and St. Anthony, via Minneapolis, to the Iowa State line, in the direction of the mouth of the Big Sioux River, or the branch thereof, via Fairbault, to the Iowa State line, to the construction of the road from La Crescent to the junction with the road from Winona, via St. Peter, to the Big Sioux River, south of the forty-fifth parallel of north latitude: And provided further, That nothing herein contained shall conflict with the said act of Congress.

SEC. 15. The Root River Valley and Southern Minnesota Railroad Company are hereby authorized and required to elect six additional directors (five of whom shall be from along the line of the road mentioned in this section) to the number already authorized by their act of incorporation. And the persons so elected shall remain in office until

the next annual election, and at said annual election, and at all future elections by the stockholders of said company, one-third of said board of directors shall be elected from citizens residing upon the roads leading from St. Paul and from St. Anthony, via Minneapolis, to the Iowa line, in the direction of the mouth of the Big Sioux River.

39 SEC. 16. The Root River Valley and Southern Minnesota Railroad Company and the Minneapolis and Cedar Valley Railroad Company shall, within forty days after the passage of this act, cause their books to be opened and kept open for ten days, or until one million of dollars to the capital stock in each of said companies shall have been subscribed, subject to the provisions of their charter and by-laws, respectively, said books to be opened at St. Paul and Minneapolis, Shakopee and St. Peter, notice of which shall be published in some newspaper printed at each of the above-named places at least two weeks before said books are so to be opened. The said Minneapolis and Cedar Valley Railroad Company and the Root River Valley and Southern Minnesota Railroad Company shall have full power and authority to become united and consolidated in a single corporation with any other railroad company in this Territory, on such terms and conditions as the board of directors of said respective companies may agree to and prescribe, and such consolidation may be authorized by said board of directors at any regular meeting of said board for that purpose. When articles of consolidation shall be duly entered into and agreed upon by the directors of the respective companies interested, they shall be submitted to the stockholders of the several companies for their approval, and if the stockholders holding a majority of the capital stock in each of the respective companies so interested shall approve the same, then they shall be subscribed by the president and secretary of each of said companies, and a duplicate thereof shall be filed in the office of the secretary of the said Territory or State, and all the rights, interests, powers, privileges, franchises, and property conferred upon such companies respectively by their act of incorporation or by this act, or held and enjoyed by said companies respectively, under their respective charters, shall vest in and be held, used, exercised, and enjoyed by the said consolidated company, under the corporate name chosen and designated in the said articles of agreement and consolidation, as fully, amply, and effectually, to all intents and purposes whatsoever, as if the same had been directly granted to or acquired by said consolidated company. The immediate government and direction of said consolidated company shall be vested in such number of directors as may be fixed and agreed upon in the articles of consolidation.

40 SEC. 17. The said companies shall respectively, within thirty days after the passage of this act, accept the same, and the acceptance shall be by a resolution adopted by the board of directors, a copy of which, duly certified by the secretary of the company, shall be deposited in the office of the secretary of said Territory within the time aforesaid.

SEC. 18. This act shall take effect and be in force from and after its passage.

Repealed.

SEC. 19. All the different companies mentioned in this act shall construct and maintain a good and substantial board and rail fence, four and one-half feet high, on both sides of their respective roads, and shall construct and maintain cattle-guards, wherever the same may be necessary, sufficient to keep cattle, sheep, horses, and hogs from off the track of said road, and shall be liable for all damages sustained by any person by reason of any neglect to keep and maintain such fence and cattle-guards in good repair. Said company shall make and keep in repair such farm-crossings as shall be necessary to accommodate the several land-owners through which the said roads may pass.

SEC. 20. The lands authorized to be taken by the said several companies for right of way and depot-grounds shall be deemed to be taken for public use.

And third. Afterwards, at a meeting of the directors of the said Minnesota and Pacific Railroad Company, named, appointed, and constituted by the sixth section of chapter one *of* the above-cited legislative act, which meeting was held in the city of Saint Paul, Minnesota, on the twenty-fifth day of May, eighteen hundred and fifty-seven, the following-named dir'ctors, constituting a quorum of said board, attended, to wit:

41 F. R. Delano, William Willim, Edmund Rice, R. R. Nelson, William L. Ames, Richard Chute, Abraham M. Fridley, Dwight Woodbury, Franklin Steele, and Charles H. Oakes.

Whereupon said first board of directors of the Minnesota and Pacific Railroad Company was then and there permanently organized by the election of Edmund Rice to be president and R. R. Nelson to be vice-president, from their own number, and by the appointment of James W. Taylor to be secretary, of J. M. Stone to be treasurer, and of John B. Brisbin to be attorney of said company.

And the board of directors of the Minnesota and Pacific Railroad Company, so met and organized as aforesaid, thereupon then and there passed the following resolution:

"Resolved, That an act of the legislative assembly of the Territory of Minnesota, approved May 22, 1857, entitled 'An act to execute the trust created by an act of Congress entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama to aid in the construction of a certain railroad in said State, and granting certain lands to railroad companies therein named," and the grants made by said act, so far as the same relate to or affect the interests of the Minnesota and Pacific Railroad Company, be, and the same are hereby, accepted and agreed to by the Minnesota and Pacific Railroad Company, upon the terms and conditions and according to the provisions in said territorial act contained."

Which act so referred to in said resolution is the same act hereinbefore set forth.

And afterwards, on the twenty-seventh day of the same month, the following certificate was made and attached to a copy of the aforesaid resolution of said board, to wit:

"We, Edmund Rice, president, and James W. Taylor, secretary, of the Minnesota and Pacific Railroad Company, do hereby certify that

42 the resolution last above set forth is a true copy from the minutes of the board of directors of said company so assembled and organized as aforesaid.

"Witness our hands this twenty-seventh day of May, 1857, at Saint Paul, in the Territory of Minnesota.

[L. S.] EDMUND RICE,
President M. & P. R. R. Co.

JAMES W. TAYLOR,
Secretary M. & P. R. R. Co."

And on the same day said copy of said resolution so certified was deposited in the office of the secretary of said Territory of Minnesota, and the then secretary of said Territory then and there appended the following certificate thereto:

"I, Charles L. Chase, secretary of the Territory of Minnesota, certify that the resolution of the Minnesota and Pacific Railroad Company, with the certificate of its authenticity by the officers of said company, of which the foregoing is a true copy, were this day deposited in my office.

"Witness my hand and the seal of said Territory this 27th day of May, A. D. 1857.

[L. S.] "CHARLES L. CHASE,
"*Secy. Minnesota Ter.*"

And your orators aver and charge that, upon the acceptance of said legislative act as aforesaid, the said act became and was a solemn contract by and between the said Territory, now State, of Minnesota, and the said Minnesota and Pacific Railroad Company, the terms of which could not afterwards be changed by the said Territory or State without the consent of said company, nor the obligation thereof be impaired by any subsequent law or act of said Territory or State, or the executive officers thereof.

And thereupon the said board of directors, immediately thereafter proceeded, in the manner, and at the places, and within the time,
43 and upon the notice prescribed in section four of chapter one of said act of May 22d, to cause books to be opened for the subscriptions to the capital stock of the said company, and in all things completed and perfected the organization of the said Minnesota and Pacific Railroad Company in conformity with the provisions of said act.

And fourth. The said company, upon the completion of its organization as aforesaid, immediately entered upon the execution of the trusts and the performance of the duties imposed upon it by the said acts and its acceptance thereof, and during the year eighteen hundred and fifty-seven, at great labor and expense, surveyed and located the whole of said line of railroad from Stillwater to Breckenridge, on the Sioux Wood River, and that part of the branch line of said road from Saint Anthony to Crow Wing; and thereupon caused the maps of such locations to be filed with the governor of Minnesota and also with the Commissioner of the General Land-Office of the United States, where the same now remain of record, to which said maps and the records thereof your orators crave leave to refer for greater certainty, and the same as if they were made part of the bill of complaint, which said locations were at or about that time approved by the Secretary of the Interior of the United States, and by his directions the land granted by

said act of Congress to aid in the construction of said roads were allotted to the said company according to said locations of its lines of road and branch, and were thereupon reserved from sale by the United States or pre-emption by settlers; and, about the same time, about thirty miles of the right of way for said road were secured by said
44 company; and on or about the twenty-seventh day of July, eighteen hundred and fifty-seven, the said company entered into a contract with one Selah Chamberlain, a responsible railroad contractor, for the construction of its said main line of railroad from Stillwater, by the way of Saint Paul, to Saint Anthony, and of its said branch line from Saint Anthony to Crow Wing, a total length of more than one hundred and forty miles of road, by the terms of which said contract that portion of said road between Saint Paul and Saint Anthony, a length of about ten miles, was to be completed ready for a train of cars on or about the first day of October, eighteen hundred and fifty-eight, and the whole distance from Stillwater to Saint Anthony, about twenty-seven miles, was to be so as aforesaid completed by the first day of September, eighteen hundred and fifty-nine; and thereafter the portion between Saint Anthony and Crow Wing was to be completed, as aforesaid, at the rate of not less than thirty miles in each year.

Work was commenced under said contract on the first day of October following, both at Saint Paul and Saint Anthony, and continued for about one month, when the financial embarrassments into which the country had then recently been plunged led the said company to inform said contractor that there was but little hope of it, the said company, being able to make payments according to the terms of said contract, and to suggest to him that the said work should be postponed and said contract be abandoned, to which the said contractor then and there assented. At that time the said company was largely in debt to many other persons besides said Chamberlain, for money borrowed, exceeding forty thousand dollars in amount, and in other large sums, for and on
45 account of said surveys of its lines of road, and other expenses necessarily incurred in and about the construction of said road and branches, which debts it was wholly unable to pay; and in the fall of said year, eighteen hundred and fifty-seven, because of the financial disaster and embarrassments then pervading throughout the whole country, and especially in Minnesota, the said company was forced to, and did, discontinue the construction of said roads.

And fifth. Your orators further show unto your honors, that at the times last aforesaid, because of the then financial condition of the country, and the fact that the said lands, granted as aforesaid to said company to aid in the construction of said roads, would, in case the said roads should not be constructed within the time specified in said act of Congress, be forfeited and revert to the United States, it was impossible for the said company to procure cash subscriptions to its stock or to borrow money upon any such obligation and securities as it was empowered by its said act of incorporation to issue and negotiate.

And the said State, being desirous of preventing, and having an interest against, such forfeiture and reversion of said lands to the United States, and with an intent to encourage and help the said railroad company and others to go forward with the public works placed under their charge by said act of May 22, and thereby to promote the interest of said State and her citizens, and to incite and encourage other parties to loan money to said railroad companies in aid of such construction—

The legislature of said State, on the ninth day of March, eighteen
46 hundred and fifty-eight, proposed to the people thereof an amend-

ment to the constitution of said State, which amendment so proposed was duly ratified and adopted by the people of said State on the fifteenth day of April, eighteen hundred and fifty-eight, by a nearly unanimous vote of said people, and became part of the constitution of said State, and is as follows, to wit:

Section ten, article nine, of the constitution, as amended April 15, 1858.

"SEC. 10. The credit of the State shall never be given or loaned in aid of any individual association or corporation, except that for the purpose of expediting the construction of the lines of railroads in aid of which the Congress of the United States has granted lands to the Territory of Minnesota. The governor shall cause to be issued and delivered to each of the companies in which said grants are vested by the legislative assembly of Minnesota the special bonds of the State, bearing an interest of seven per cent. per annum, payable semi-annually in the city of New York, as a loan of public credit, to an amount not exceeding twelve hundred and fifty thousand dollars, or an aggregate amount to all of said companies not exceeding five millions of dollars, in manner following, to wit:

Whenever either of the said companies shall produce to the governor satisfactory evidence, verified by the affidavits of the chief engi-
47 neer, treasurer, and two directors of said company, that any ten miles of the road of said company has been actually constructed and completed, ready for placing the superstructure thereon, the governor shall cause to be issued and delivered to such company bonds to the amount of one hundred thousand dollars; and whenever thereafter, and as often as either of said companies shall produce to the governor like evidence of a further construction of ten miles of its road as aforesaid, then the governor shall cause to be issued to such company further like bonds to the amount of one hundred thousand dollars for each and every ten miles of road thus constructed; and whenever such company shall furnish like evidence that any ten miles of its road is actually completed and cars running thereon, the governor shall cause to be issued to such company like bonds to the amount of one hundred thousand dollars; and whenever thereafter, and as often as either of said companies shall produce to the governor like evidence that any further ten miles of said road is in operation as aforesaid, the governor shall cause to be issued to such company further like bonds to the amount of one hundred thousand dollars, until the full amount of the bonds hereby authorized shall be issued, provided that two-fifths, and no more, of all bonds issued to the Southern Minnesota Railroad Company shall be expended in the construction and equipment of the line of road from La Crescent to the point of junction with the transit road, as provided by law. And further provided, that the Minneapolis and Cedar Valley Railroad Company shall commence the construction of their road at Faribault
48 and Minneapolis, and shall grade an equal number of miles from each of said places.

The said bonds thus issued shall be denominated "Minnesota State railroad bonds," and the faith and credit of this State are hereby pledged for the payment of the interest and redemption of the principal thereof. They shall be signed by the governor, countersigned and registered by the treasurer, sealed with the seal of the State, of denominations not exceeding one thousand dollars, payable to the order of the company to whom issued, transferable by the endorsement of the president of the said company, and redeemable at any time after ten and before the ex-

piration of twenty-five years from the date thereof. Within thirty days after the governor shall proclaim that the people have voted for a loan of State credit to railroads, any of said companies proposing to avail themselves of the loan herein provided for, and to accept the conditions of the same, shall notify the governor thereof, and shall, within sixty days, commence the construction of their roads; and shall, within two years thereafter, construct, ready for the superstructure, at least fifty (50) miles of their said road. Each company shall make provision for the punctual payment and redemption of all bonds issued and delivered as aforesaid to said company, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of this State from any advances of money for that purpose; and as security therefor, the governor shall demand and receive from each of said companies, before any of said bonds are issued, an instru-
49 ment pledging the net profits of its road for the payment of said interest, and a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which such company is or may be authorized to sell, in trust, for the better security of the treasury of the State from loss on said bonds, which said deed of trust shall authorize the governor and secretary of state to make conveyances of title to all or any of such lands to purchasers agreeing with the respective railroad companies therefor, provided that before releasing the interest of the State to such lands such sale shall be approved by the governor; but the proceeds of all such sales shall be applied to the payment of interest accruing upon the bonds in case of default of the payment of the same, and as a sinking-fund to meet any future default in the payment of interest and the principal thereof when due; and, as further security, an amount of first-mortgage bonds on the roads, lands, and franchises of the respective companies, corresponding to the State bonds issued, shall be transferred to the treasurer of the State at the time of the issue of State bonds; and in case either of said companies shall make default in payment of either the interest or principal of the bonds issued to said companies by the governor, no more State bonds shall thereafter be issued to said company, and the governor shall proceed, in such manner as may be prescribed by law, to sell the bonds of the defaulting company or companies, or the lands held in trust as above, or may require a foreclosure of the mort-
gage executed to secure the same: Provided, That if any company
50 so in default, before the day of sale, shall pay all interest and principal then due, and all expenses incurred by the State, no sale shall take place, and the right of said company shall not be impaired to a further loan of State credit: Provided, If any of said companies shall at any time offer to pay the principal, together with the interest that may then be due, upon any of the Minnesota State Railroad bonds which may have been issued under the provisions of this section, then the treasurer of the State shall receive the same; and the liabilities of said company or companies, in respect to said bonds, shall cease upon such payment into the State treasury of principal, together with the interest, as aforesaid: Provided further, That in consideration of the loan of State credit herein provided, *that* the company or companies which may accept the bonds of the State, in the manner herein specified, shall, as a condition thereof, each complete not less than fifty miles of its road on or before the expiration of the year 1861, and not less than one hundred miles before the year 1864, and complete four-fifths of the entire length of its road before the year 1866, and any failure on the part of any such company to complete the number of miles of its road or roads, in the manner and within the several times herein prescribed, shall for-

feit to the State all the rights, title, and interest, of any kind whatsoever, in and to any lands, together with the franchise connected with the same not pertaining or applicable to the portion of the road by them constructed and a fee-simple to which has not accrued to either of
51 said companies by reason of such construction, which was granted to the company or companies thus failing to comply with the provisions hereof by act of the legislature of the Territory of Minnesota, vesting said land in said companies respectively.

(Which said amendment, and the act of the said legislature proposing the same, are published in the General Session Laws of said State for the year 1858, on page 9, &c.)

And on the fifth day of May, eighteen hundred and fifty-eight, the Governor of said State issued his proclamation, as provided in said amendment, in and by which he proclaimed that the people of said State had voted for a loan of State credit to railways, and adopted the said amendment; and thereupon, within thirty days thereafter, to wit, on or about the first day of June, eighteen hundred and fifty-eight, the said Minnesota and Pacific Railroad Company duly notified the said Governor, according to the provisions of said amendment, that the said company proposed to avail itself of the loan in said amendment provided for, and to accept the conditions of the same.

And your orators aver and charge that, upon the acceptance thereof as aforesaid by the said company, the said amendment to the constitution of Minnesota became and was a solemn contract by and between the State of Minnesota of the one part, and the said Minnesota and Pacific Railroad Company of the other part. That all its terms, provisions, promises, and obligations, as the same were therein expressed and intended, were binding and obligatory upon the people, the legislature, the governor, and all the officers of said State of Minnesota, as a contract, which could not be changed without the consent of the said
52 company, and the obligations of which could not, in any manner or degree, be impaired by any act of the people of said State, or the legislature, or the executive thereof.

And sixth. At or about the time the said amendment to the constitution was adopted and accepted by said company as aforesaid, the said company, in full and confident reliance upon the good faith of the State of Minnesota, and upon the credit and aid of said State by her credit, as in and by said amendment provided and pledged to it; and that upon its acceptance by said company the same would become a contract with it, the obligation of which could not be impaired by any subsequent act of the said State, the said company made and entered into a new contract with the said Chamberlain for the construction of fifty miles of its said railroads, as follows: From Saint Paul to Saint Anthony, and thence up the Mississippi River, via Anoka, to Big Lake, the same to be a first-class railroad, with all necessary side-tracks, complete and to be completed, ready for the rolling-stock, in two years from the twenty-fifth day of May, eighteen hundred and fifty-eight, for which the said company agreed to pay him at the rate of twenty-three thousand dollars per mile, as follows, to wit, twenty thousand dollars per mile in the said State railroad bonds provided for and pledged to the said company in and by the said amendment, which the said company confidently relied upon receiving from said State upon compliance with the terms and requirements of said amendment, and which said State railroad bonds said Chamberlain agreed to receive in such payment at
53 their par value; and the balance of said contract-price, to wit, three thousand dollars per mile, the said company agreed to pay,

and said Chamberlain agreed to receive, in payment thereof, *in* the first-mortgage bonds of the company, to be issued under the authority of the twenty-first section of chapter one of said act of incorporation of said company, passed May 22d, A. D. 1857, hereinbefore set forth; the said bonds to be a part of the series hereinafter specified, and secured by the deed of trust to your orators and William H. Welch, (now deceased,) hereinafter set forth, bearing date the 31st day of July, 1858; and the said company agreed to pay, and the said Chamberlain agreed to receive, said first-mortgage bonds in payment, as aforesaid, at their market-value, when such payment should become due.

And on or about the twenty-third day of June, eighteen hundred and fifty-eight, in like reliance on the faith and credit and the aid of said State by its credit as provided by said constitutional amendment, a supplement was added to said last-mentioned contract by the parties thereto, by the terms of which said Chamberlain agreed to extend said railroad thirty miles from Big Lake aforesaid, and terminating at Saint Cloud or Sauk Rapids, he doing all the work and furnishing all the materials therefor except the iron rail, and for this the said company agreed to pay him at the rate of eighteen thousand dollars per mile, which, by said agreement, was to be paid as follows, to wit: two hundred and fifty thousand dollars in the said Minnesota State railroad bonds, at their par value, and the balance in cash, which cash the said company relied upon procuring solely by a sale of its first-mort-
54 gage bonds of the series described in and secured by the deed of trust to your orators and said William H. Welch, hereinafter set forth.

And on the fifteenth day of July, eighteen hundred and fifty-eight, in like reliance on the faith of said State, and the credit and aid of the same, as pledged to it in and by said amendment of the constitution, the said company entered into a contract with one Alexander Frink, a responsible railroad-contractor, by the terms of which said Frink agreed to construct and finish a first-class line of railroad from Stillwater to Saint Paul, a distance of over sixteen miles, including all the materials and work necessary to complete said road, to subgrade, viz, grading, masonry, bridging, timber, trestle work, cattle-guards, undation, and all other work not enumerated necessary to the full and entire completion of said work: Beginning at Stillwater, five miles thereof were to be finished on or before the fifteenth day of July, eighteen hundred and fifty-nine, and the whole of the same by the fifteenth day of July, eighteen hundred and sixty, for which the said contractor was to be paid at the rate of eleven thousand dollars per mile, which the said company so promised to pay him, relying solely upon sales of its first-mortgage bonds of the series described in and secured by the said deed of trust to your orators and said Welch. And thereupon, upon the faith of said contract, and relying on the good faith of said State, and the prompt performance of all its obligations under said constitution as amended as aforesaid, both the said contractors immediately and energetically entered upon the performance of said contracts.

55 And seventh. On the thirty-first day of July, eighteen hundred and fifty-eight, under and pursuant to the power and authority conferred upon it by said section twenty-one, chapter one, of act of May 22, 1857, (the charter of said company,) in order that it might thereby be enabled to meet, keep, and perform all its engagements, obligations, and promises, undertaken, created, and made by its said acceptance of said amendment of the constitution and the said contracts with said Chamberlain and Frink, and also pay the said debts by it contracted

and incurred in the year eighteen hundred and fifty-seven for surveys, &c., as hereinbefore stated, and which still remained unpaid, the said Minnesota and Pacific Railroad Company, in its corporate capacity did, on said 31st day of July, pursuant to resolutions before then duly passed and adopted by its board of directors at a regular meeting thereof, held at St. Paul, in the State of Minnesota, *did* duly execute under its corporate seal, and deliver to your orators and William H. Welch (now deceased) in trust for the holders of the bonds therein described, as therein set forth, a certain indenture or deed of trust and mortgage in the words and figures following, to wit:

This indenture, made this thirty-first day of July, in the year of our Lord one thousand eight hundred and fifty-eight, at New York, in the State of New York, between the Minnesota and Pacific Railroad Company, a body-corporate, created by an act of the legislative assembly of the late Territory of Minnesota, hereinafter referred to, party of the first part, and Elon Farnsworth, of the State of Michigan, Edward P. Cowles, of the city of New York, and William H. Welch, of the State of Minnesota, parties of the second part, trustees, as hereinafter mentioned, witnesseth:

56 Whereas by an act of the Congress of the United States of America, approved on the third day of March, in the year of our Lord one thousand eight hundred and fifty-seven, entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in said State," there was granted by the United States of America to the late Territory of Minnesota, for the purpose of aiding in the construction of railroads from and to certain points and places mentioned in said act, (to which act reference is hereby made for a particular description thereof,) every alternate section of land designated by odd numbers, for six sections in width on each side of said roads and branches, except in cases where it should appear that the United States had, when the lines or routes of said roads were definitely fixed, sold any of such sections or parts of sections, or that the right of pre-emption had attached to the same; and in such cases it was provided by said act of Congress *and* there should be granted to said Territory, for the like purposes before mentioned, so much land, nearest to the tiers of sections above specified, in alternate sections, or parts of sections, as should be equal to such lands as the United States may have sold, or otherwise appropriated, or to which the rights of pre-emption may have attached, the same to be selected by any agent or agents, to be appointed by the governor of said Territory, or future State of Minnesota, subject to the approval of the Secretary of the Interior, and to be located not further than fifteen miles from the lines of said railroads or branches; and it being provided by said act that the lands thereby granted, for and on account of said roads and branches severally, should be exclusively applied in the construction of that road, for and on account of which such lands were thereby granted, and should be disposed of only as the work progresses.

And whereas the legislative assembly of the late Territory of Minnesota, by an act approved on the 22d day of May, in the year of our Lord 1857, entitled "An act to execute the trust created by an act of Congress, entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain

57 railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a

certain railroad in said State, and granting certain lands to railroad companies therein named,'" did create the party of the first part hereto a body corporate and politic, by the name and style above given, and did constitute F. R. Delano, William Willim, Alexander Ramsey, Edmund Rice, R. R. Nelson, William L. Ames, Richard Chute, Henry T. Welles, Abram M. Fridley, Dwight Woodbury, Franklin Steele, S. B. Lowry, J. D. Crittenden, Charles H. Oakes, and Daniel Bassett the first board of directors; and did authorize and empower the said party of the first part to locate, construct, maintain, and operate a railroad, with one or more tracks or lines of rail on such route as said party of the first part should think proper, from Stillwater, by way of St. Paul and St. Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood River, with a branch from St. Anthony, via Anoka, Saint Cloud, and Crow Wing, to Saint Vincent, near the mouth of the Pembina River, the said railroad and branch being one of the railroads and branches specially mentioned in and provided for by said act of Congress, and for the purpose of aiding in the construction of the said railroad and branch, did grant to said party of the first part all the interest and estate, present and prospective, of said Territory, and of the future State which should succeed it, in or to any or all of the lands granted by the Government of the United States to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via Saint Cloud and Crow Wing to the navigable waters of the Red River of the North, to the point hereinbefore mentioned, under and by virtue of the act of Congress, approved on the third day of March, 1857, hereinbefore referred to, together with all and singular the rights, privileges, and immunities conferred or intended to be conferred by said act of Congress, conditioned that said land should be exclusively applied to the construction of the road hereinbefore described; the title to all which lands was to be vested in said party of the first part, in various parcels, from time to time, in accordance with the provis-
58 ions of said act of the legislative assembly of the late Territory of Minnesota, to which provisions reference is hereby made by said party of the first part, and subject to which this indenture is executed.

And whereas the said party of the first part, by the eleventh section of said act of the legislative assembly of the late Territory of Minnesota, was expressly authorized and empowered, in its corporate capacity, to borrow money from any person or persons, corporation or body-politic of any kind, and for any rate of interest which may be agreed upon by and between said party of the first part and any person or party of whom such loan may be obtained, any law on the subject of usury of said Territory or future State, or any State where such transaction may be made, to the contrary notwithstanding, and to make, execute, and deliver all necessary writings, notes, bonds, mortgages, or other obligations and securities, in amount and kind as might be deemed expedient by said party of the first part, in consideration of any such loan, or in discharge of any liabilities which it may incur in the construction, repair, equipment, or operating of said road; and by the twenty-first section of said act of the legislative assembly of the late Territory of Minnesota, the said party of the first part was further expressly authorized and empowered, in its corporate capacity, to make, execute, issue, and deliver its bonds or obligations, in any amount which the directors thereof may deem necessary or expedient, and to prescribe the

sum or sums for which each of said bonds should be issued, the time or times, and place or places, when and where the principal and interest of the same should be payable, the person or persons, trustee or trustees, or corporation to whom or to which they shall be payable, and whether payable to order or to bearer, or how otherwise negotiable, the rate of interest which said bonds shall bear, and the manner and form in which the interest-coupons annexed to them shall be executed, and for the purpose of securing the payment of all or any of said bonds, the said party of the first part was further, by said twenty-first section of said act of the legislative assembly of the late Territory of Minnesota, expressly authorized and empowered, in its corporate capacity, to make, execute, and deliver one or more mortgages or deeds of trust upon the whole or any part of its railroad or branches, constructed, or au-

59 thorized to be constructed, and of the estate granted by the said act, of which said section was a part, and any and all other of its estate, real, personal, or mixed, in possession or expectancy, and in and by such mortgage or deed of trust to confer upon the trustee or mortgagee full and ample powers to enter into and upon, and take possession of, have, use, and employ, or to sell and dispose of the whole or any part of said railroad and branches, and all corporate and other franchises, rights, and privileges of the said party of the first part; and, in case of any such sale, to grant and convey to the party or parties acquiring title under such sale, and their associates, successors, and assigns, all and the same rights, privileges, grants, franchises, immunities, and advantages, in and by such mortgage or deed of trust enumerated and conveyed, which belonged to and were enjoyed by said party of the first part, as fully and absolutely in every respect as said party of the first part, its stockholders, officers and agents, might or could have done, if such sale or foreclosure had not taken place; and the directors of said party of the first part were further, by said twenty-first section of said act of the legislative assembly of the late Territory of Minnesota, authorized and empowered to prescribe, by resolution to be by them adopted, all matters relating to the form and terms of any such mortgage or deed of trust, and of its execution and delivery; and to provide for the periodical payment to such trustee or receiver as they shall appoint, a certain sum, to create a sinking-fund with which to pay off and discharge, at or before maturity, all or any of the bonds by them authorized to be issued; and also to provide the manner in which such trustee or receiver shall pay out, or dispose of, such sinking-fund, and to authorize him to designate by lot, or any other suitable manner, the bond or bonds, to the payment of which said sinking-fund, or any part thereof, shall be applied; and the said party of the first part being further authorized and empowered by said twenty-first section of said act of the legislative assembly of the late Territory of Minnesota, through its agents or brokers, or otherwise, at any place, to sell, loan, pledge, hypothecate, or otherwise dispose of, any or all of the aforesaid bonds, so as aforesaid authorized to be issued, at par, or at any price less than par, and for such sum or sums, and on such terms, as to the said party of the first part, its agents or brokers, shall appear most for its interest.

60 And whereas the board of directors of the said party of the first part, after the passage of the said act of the legislative assembly of the late Territory of Minnesoto, at a meeting held in the city of Saint Paul, Minnesota, on the 25th day of May, A. D. 1857, permanently organized by the election of Edmund Rice to be president, and R. R. Nelson to be vice-president, and by the appointment of Jas.

W. Taylor to be secretary, of J. M. Stone to be treasurer, and of John B. Brisbin to be attorney thereof; and after such organization, by a resolution duly passed, accepted the aforementioned act of the legislative assembly of the late Territory of Minnesota, approved on the 22d day of May, A. D. 1857, and the grants thereby made, so far as they relate to or affect the interests of said party of the first part, upon the terms and conditions, and according to the provisions in said act contained, a copy of which resolution, certified by the president and secretary of said party of the first part, under its corporate seal, was, on the same day, deposited in the office of the secretary of state of said Territory of Minnesota.

And whereas the said party of the first part has deemed it advisable to provide for the issue and disposal, now and hereafter, of its bonds sufficient to pay all present liabilities, and provide for the payment of the contract already entered into between it and Selah Chamberlain, for the construction of fifty miles of its road from Saint Paul to Saint Anthony, and thence up the Mississippi River via Anoka to Big Lake, and also the means for the further construction, completion, and equipment of its said railroad, from time to time, as shall be deemed expedient and prudent, and by the issue and disposal of such bonds, to become indebted to various persons and bodies politic or corporate, who shall become the holders of said bonds or obligations.

And whereas, for the purpose of more effectually securing the said bonds, it is expedient that the party of the first part should execute a mortgage-deed upon its property and franchises, as hereinafter specified, in security for the payment of the principal and interest of said bonds, which said bonds so to be issued, shall each be in the sum of one thousand dollars, and shall be regularly numbered and signed by the president and secretary of the said party of the first part, and registered and countersigned by the parties of the second part hereto, trus-
61 tees, and shall bear such a rate of interest (with coupons therefor attached) as may from time to time, as issued, be decided upon, not to exceed the rate of seven per centum per annum, and shall all become due to the holders thereof on the first day of August, A. D. 1883, and are to be issued in series and in parcels, from time to time, as required for the purposes aforesaid, in the aggregate to the amount of twenty-three millions of dollars, or at the rate of, but not exceeding, thirty-five thousand dollars for each mile of road, if found necessary as hereinafter specified, and are to stand equally and ratably secured by these presents, according to the respective amounts, without any preference in respect to priority of date or time of issue:

Now, therefore, this indenture witnesseth that the party of the first part, in consideration of the premises and of the sum of one dollar, in hand paid by the parties of the second part, the receipt of which is hereby acknowledged, and in order to secure the bonds to be issued as herein provided, and the interest thereon, and every part thereof, as the same shall from time to time become due and payable according to the tenor and effect thereof, and the coupons or interest-warrants thereto a nexed, hath granted, conveyed, transferred and assigned, and by these presents doth grant, convey, transfer and assign unto the said parties of the second part, as joint tenants and not as tenants in common, and to their survivors or successors in the trust hereinafter expressed, the entire railroad of said party of the first part, from Stillwater by way of Saint Paul and Saint Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood River, with a branch from Saint Anthony, via Anoka, Saint Cloud, and Crow Wing, to

Saint Vincent, near the mouth of the Pembina River; also, all the railways, rails, bridges, fences, ties, spikes, culverts, right of way, station-houses, and other buildings, and such lands as are selected or actually in use for depot or station-grounds, now held or owned, or which may hereafter be held or owned, by said party
62 of the first part, for the purpose of constructing, operating, and maintaining its said railroad, or the accommodation of the business thereof; also, all the tolls, income, rents, issues, profits, and alienable franchises of the said party of the first part, connected with its said railroad or relating thereto; also, all the locomotive or stationary engines, tenders, and cars of every kind, machinery, machine-shops, tools, and implements, and materials connected with or intended for the construction, equipment, operating, and conducting of said railroad and branch, hereby conveyed or intended to be conveyed, now owned or hereafter to be acquired by the party of the first part, all of which are declared to be appurtenances and fixtures of said railroad, and are to be used and sold therewith, and not separated therefrom, and are to be taken as part thereof. And the party of the first part agrees to furnish to the parties of the second part, or to the survivor of them, or their successors, or the successors of each survivor, from time to time, upon their or his reasonable request, a true and full inventory of all the movable property appertaining to said railroad and the operation thereof, and which is transferred or agreed to be transferred by this indenture; but no default to demand or to furnish such inventory shall impair the operation or effect of this indenture, upon all or any of the property herein agreed to be transferred.

To have and to hold the said granted premises, unto the said parties of the second part as joint tenants, and not as tenants in common,
63 and their survivors or successors in the trust hereby created, on the trust and for the purposes following, that is to say:

First. If the interest on the bonds so to be issued shall not be paid by the party of the first part, when the same shall fall due, and if there shall be no moneys in the hands of the parties of the second part, out of which said interest may be paid in accordance with the provisions of this indenture, and if such interest shall remain in arrear for six months after having been demanded, or if there shall be a failure to pay the principal of said bonds, or any of them, or any part thereof, when due and demandable, according to the tenor and effect thereof, then, and in either case, it shall be lawful for the parties of the second part, or the survivor of them, or his or their successors in the trust hereby created, to take possession of all and singular the said premises hereby conveyed or transferred, or expressed, or intended so to be, and to cause the said railroad to be used and operated, and kept in repair, and its business conducted by themselves or such agents, superintendents, managers, and servants, as they may appoint, and to apply the net income received therefrom to the payment, first, of the interest of said bonds, and the surplus to the payment of the principal thereof, if any there be due.

And at any time after such default, upon the request of the holders of two hundred and fifty thousand dollars in amount, of said bonds, upon being indemnified for their costs and expenses, said parties of the second part, or their successors under this indenture, may and
64 shall enter upon and take possession of, or if already in possession, shall, upon such request, sell all and singular the said premises hereinbefore and hereinafter conveyed and transferred, or expressed, or intended so to be, or only so much or such parts thereof as they shall

deem necessary and proper, with a due regard to the interests of all parties, first giving notice by advertisement in two daily newspapers, printed in the cities of Saint Paul and New York, to be continued for four months or such shorter time, not less than forty days, as the party of the first part may, by resolution of its board of directors, assent to; and until such sale, may operate the said railroad as aforesaid, being accountable for, and applying the income of said roads as hereinbefore expressed.

Provided, that such parties of the second part may, if in their judgment the best interests of the bondholders shall require it, sell the same for cash, or partly for cash and partly on credit, not to be extended beyond the period of two years, and on receiving full payment for the same, may execute to the purchasers a full and valid conveyance of all and singular the premises sold; and from the proceeds of said sale, or of the operation of said road, until sold, after deducting just allowances for their services and expenses, said trustees, parties of the second part hereto, shall pay, first, the interest due and in arrear of said bonds, and next the principal thereof in full, or ratably, so far as such proceeds or income shall suffice; or if said sale shall comprise but a portion of said premises, and after reasonable time and public notice given, the holders of any of said bonds shall fail to apply for their ratable proportion of the residue of such proceeds of such sale, the same may be used in the purchase and cancelment of said bonds. For all charges and expenses of operating and maintaining said road, and the management of said business, the said trustees shall be indemnified out of the proceeds of the sale of said road, if needful, as well as out of the income thereof.

In case any surplus shall remain in the hands of the trustees, or
65 trustee, the same shall be paid over to the party of the first part, its successors or assigns: Provided, however, that if a majority in interest of said bondholders shall deem such sale inadvisable, or the time named for it unfavorable to the interests of said bondholders, and if they shall, in writing, request the trustees to delay such sale, said trustees shall postpone the same, to such time, not exceeding twelve months, as may be named in said writing.

Second. It is agreed between the parties hereto, that if for the nonpayment of interest, or principal, of the bonds as hereinfore provided, the said parties of the second part shall enter into, and take possession of, the premises herein conveyed or transferred, and shall cause said railroad to be operated, and its business to be managed by themselves, that in such event, if at any time prior to the absolute sale of said premises said party of the first part shall have paid, or caused to be paid, the interest and principal due upon all such bonds, and all costs and damages that may have accrued in consequence thereof, so that there shall be no longer any default, or arrearage of interest or principal, then and in such case said sale shall not be made; but said parties of the second part shall surrender up and deliver to said party of the first part all of said railroad, with its appurtenances, so taken possession of by them, and shall pay over to said party of the first part the proceeds arising from the income of said road, after deducting a just allowance for their services and expenses, and all charges and expenses of operating and maintaining said road, and the management of said business.

Third. The party of the first part covenants with the parties of the second part, and their successors in this trust, for the benefit of the holders of said bonds, that the party of the first part shall and
66 will, at the reasonable request of the parties of the second part, and their successors in the trust hereby created, make and exe-

cute all further assurances, conveyances, and instruments, needful or proper to convey unto them, upon the trust and conditions herein contained, all the said premises expressed or intended to be granted as aforesaid, and all which may hereafter appertain to the said road.

Fourth. Until there has been a default in the payment of the interest or principal of said bonds so to be issued, or some of them, the party of the first part shall continue in the possession, management, and control of all and singular the lands, railroad, premises, appurtenances, and other property hereinbefore and hereinafter granted, together with the rents, income, and profits thereof.

Fifth. It is understood and agreed, anything in this indenture contained to the contrary notwithstanding, that if it shall become expedient for the said party of the first part to sell or exchange, or otherwise dispose of, any of the real estate or grounds now held or owned by them, or which may hereafter, at any time, be held or owned by them, for depots, and station purposes, or for gravel-pits, or on which any engine-houses, shops, or other buildings, designed for the use of said party of the first part, in the operation of its railroad or the accom'odation of its business are or may be erected, the said party of the first part, with the approval of the parties of the second part, has full power to sell, exchange, dispose of, and convey any such real estate or grounds; and the parties of the second part, and their successors in this trust, shall have power to release any such real estate or grounds so sold, exchanged, or conveyed: Provided, however, that all moneys or obligations received in case of such sale shall be subject to the control of the parties of the second part as trust funds, so far as not re-invested for the use and accommodation of the road; and that all real estate hereafter acquired by said party of the first part, for the purposes aforesaid, in lieu or in exchange for such as may have been sold or exchanged, as aforesaid, shall become and be subject to the operation of this indenture, in like manner as if the same were herein specifically described, with like power of sale or exchange by said party of the first part, as in the case of real estate or ground now held or owned by them as aforesaid.

67 But it is expressly understood, that until such power of sale or exchange is exercised by said party of the first part, all the real estate in this stipulation contemplated shall be and remain subject to the lien and operation of this indenture. Nothing in this indenture contained shall be construed to prevent said party of the first part from disposing by sale or exchange, from time to time, of any part of the machinery, shop-tools and rolling equipment, and other personal property now owned or hereafter to be owned, by said party of the first part, and acquired, either by purchase or manufacture, which may become unsuited, unnecessary or impaired in value by use, or require renewal, or which is not used by said party of the first part; but all property purchased or manufactured by said party of the first part, for its use, or to replace that so sold or exchanged, shall immediately, to all intents and purposes, become subject to the lien or operation of this indenture, to the same extent as the property for which it was so exchanged or substituted.

And the party of the first part, for the consideration hereinbefore expressed, and for the more ample and perfect security for the payment of the bonds aforesaid, to be issued as herein provided, and the interest thereon, and every part thereof, as the same shall from time to time become due and payable, according to the tenor and effects of said bonds, and the coupons or interest-warrants thereto annexed, hath granted, bargained, sold, conveyed, assigned, and confirmed, and by these pres-

ents doth grant, bargain, sell, convey, and assign, unto the said parties of the second part, as joint tenants, and not as tenants in common, and to their survivors or successors, in the trust herein expressed, all the right, title, interest, claim or demand which the said party of the first part now has, or which it shall or may hereafter acquire or become entitled to, in or to all those sections or parts of sections of land
68 granted to the late Territory of Minnesota, by the act of the Congress of the United States of America, the title to which is hereinbefore given, approved on the third day of March, A. D. 1857, for the purpose of aiding in the construction of a railroad from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch via Saint Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the legislature of said Territory might determine, and which were subsequently granted to said party of the first part by an act of the late Territory of Minnesota, approved on the twenty-second day of May, A. D. 1857, entitled as hereinbefore stated, for the purpose of aiding the said party of the first part in the construction of its railroad from Stillwater, by way of Saint Paul and Saint Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood River, with a branch from Saint Anthony, via Anoka, Saint Cloud, and Crow Wing, to Saint Vincent, near the mouth of the Pembina River, being in all about two million four hundred and sixty-seven thousand and six hundred acres of land, be the same more or less, and situated in the present State of Minnesota, adjoining and adjacent to the line of the railroad of said party of the first part, and its branch, as hereinbefore described, full lists of which will be appended to this instrument, as said lands are surveyed, selected and certified, said lists to be signed by the president of the company and to be taken and considered as part and parcel of this deed, without reference to the dates
69 of said lists, together with all and singular the endowments, income, and advantages, tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rent, issues, and profits thereof; and also all the estate, right, title, and interest, property, possession, claim and demand, whatsoever, at law or in equity, present or prospective, of the said party of the first part of, in and to the same and each and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the lands and premises hereby granted, or intended so to be, and each and every part and parcel thereof, with the appurtenances, unto the said parties hereto of the second part, and the survivors and survivor of them and their successors forever, as joint tenants, and not as tenants in common, for the uses and purposes in this indenture set forth and declared, and subject to the provisions and requirements of the before-mentioned act of Congress and the said act of the legislative assembly of the late Territory of Minnesota, granting said lands to said party of the first part.

This indenture is executed, and the conveyances and transfers, as well of the aforesaid lands and interests in lands, as of the said line of road and its appurtenances, are made to the said parties of the second part, and accepted by them upon the following terms, conditions, and provisions:

First. No bonds shall be issued under this trust by the party
70 of the first part hereto, until registered and countersigned by the said trustees, the parties of the second part hereto, nor shall any

such bonds be a legal or valid obligation unless so registered and countersigned.

Second. It is agreed between the parties hereto that the said party of the first part, having already contracted for the construction and completion of fifty miles in length of its road, from Saint Paul to Saint Anthony, and thence up the Mississippi River, via Anoka, to Big Lake, may new proceed to execute and dispose of a first issue of its bonds, for the purposes aforesaid, to the amount of one million seven hundred and fifty thousand dollars, being at the rate of thirty-five thousand dollars for each mile of its road, so as aforesaid contracted for, the same to be registered and countersigned as before stated. And it is understood and agreed between the parties hereto that the said party of the first part may, at any time hereafter, so often as the construction of a section of its said railroad, or its branch of forty miles in length additional to the said fifty miles now under contract, shall be contracted for, make further issues of its bonds for the purposes aforesaid, to an amount not exceeding thirty-five thousand dollars for each mile of every section of forty miles so to be contracted for, and so on as the work progresses, and until the final completion of said railroad and its said branch.

Provided, however, that the total issue of said bonds, including the said amount of one million seven hundred and fifty thousand dollars, now authorized to be issued, shall not exceed the sum of thirty-
71 five thousand dollars for each mile of the said road and its branch:

And provided further, that all of said bonds shall first be countersigned and registered by said parties of the second part, their survivors or successors, before the same or any part thereof shall be issued.

Third. All moneys, after deducting the expenses of executing this trust, arising from the sales of said lands, are hereby sacredly pledged to the payment of said bonds, so to be issued, and of the interest coupons and warrants thereon. And all such money shall be applied by said parties of the second part, from time to time, as they shall receive the same, first to the payment of the interest coupons or warrants annexed to said bonds, as fast as the same shall become due and payable; second, in purchasing and cancelling such outstanding bonds as can be obtained at their market-value, not exceeding, however, a premium of ten per cent.; and, third, to the payment of such of the bonds themselves as may not have been purchased in accordance with the foregoing provision, when the same shall become due and payable; but it is understood and agreed that all the current net earnings and income of the road of said party of the first part, after deducting current expenses, shall be appropriated and used from time to time, if necessary, in the payment of the interest on said bonds.

Fourth. If there shall at any time be a default in the payment of interest or principal upon said bonds, and continue for six months after the same shall become due, the parties of the second part are authorized and empowered, in their discretion, to sell at public auction, after
72 notice published for three months in one or more newspapers in New York, Saint Paul, and such other place as they may designate, so much of said lands as shall be necessary to pay and satisfy such liabilities; or they may proceed as hereinbefore provided. And if sufficient money shall not be realized from such sales of land, then said parties of the second part may proceed, in the manner hereinbefore provided, to sell the entire road and franchises, or other property or lands, or so much thereof as may be necessary to pay and satisfy such bonds or so much as may be due thereon.

Fifth. All the trust moneys which shall come into the hands of the

ents doth grant, bargain, sell, convey, and assign, unto the said parties of the second part, as joint tenants, and not as tenants in common, and to their survivors or successors, in the trust herein expressed, all the right, title, interest, claim or demand which the said party of the first part now has, or which it shall or may hereafter acquire or become entitled to, in or to all those sections or parts of sections of land
68 granted to the late Territory of Minnesota, by the act of the Congress of the United States of America, the title to which is hereinbefore given, approved on the third day of March, A. D. 1857, for the purpose of aiding in the construction of a railroad from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch via Saint Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the legislature of said Territory might determine, and which were subsequently granted to said party of the first part by an act of the late Territory of Minnesota, approved on the twenty-second day of May, A. D. 1857, entitled as hereinbefore stated, for the purpose of aiding the said party of the first part in the construction of its railroad from Stillwater, by way of Saint Paul and Saint Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood River, with a branch from Saint Anthony, via Anoka, Saint Cloud, and Crow Wing, to Saint Vincent, near the mouth of the Pembina River, being in all about two million four hundred and sixty-seven thousand and six hundred acres of land, be the same more or less, and situated in the present State of Minnesota, adjoining and adjacent to the line of the railroad of said party of the first part, and its branch, as hereinbefore described, full lists of which will be appended to this instrument, as said lands are surveyed, selected and certified, said lists to be signed by the president of the company and to be taken and considered as part and parcel of this deed, without reference to the dates
69 of said lists, together with all and singular the endowments, income, and advantages, tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rent, issues, and profits thereof; and also all the estate, right, title, and interest, property, possession, claim and demand, whatsoever, at law or in equity, present or prospective, of the said party of the first part of, in and to the same and each and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the lands and premises hereby granted, or intended so to be, and each and every part and parcel thereof, with the appurtenances, unto the said parties hereto of the second part, and the survivors and survivor of them and their successors forever, as joint tenants, and not as tenants in common, for the uses and purposes in this indenture set forth and declared, and subject to the provisions and requirements of the before-mentioned act of Congress and the said act of the legislative assembly of the late Territory of Minnesota, granting said lands to said party of the first part.

This indenture is executed, and the conveyances and transfers, as well of the aforesaid lands and interests in lands, as of the said line of road and its appurtenances, are made to the said parties of the second part, and accepted by them upon the following terms, conditions, and provisions:

First. No bonds shall be issued under this trust by the party
70 of the first part hereto, until registered and countersigned by the said trustees, the parties of the second part hereto, nor shall any

such bonds be a legal or valid obligation unless so registered and countersigned.

Second. It is agreed between the parties hereto that the said party of the first part, having already contracted for the construction and completion of fifty miles in length of its road, from Saint Paul to Saint Anthony, and thence up the Mississippi River, via Anoka, to Big Lake, may new proceed to execute and dispose of a first issue of its bonds, for the purposes aforesaid, to the amount of one million seven hundred and fifty thousand dollars, being at the rate of thirty-five thousand dollars for each mile of its road, so as aforesaid contracted for, the same to be registered and countersigned as before stated. And it is understood and agreed between the parties hereto that the said party of the first part may, at any time hereafter, so often as the construction of a section of its said railroad, or its branch of forty miles in length additional to the said fifty miles now under contract, shall be contracted for, make further issues of its bonds for the purposes aforesaid, to an amount not exceeding thirty-five thousand dollars for each mile of every section of forty miles so to be contracted for, and so on as the work progresses, and until the final completion of said railroad and its said branch.

Provided, however, that the total issue of said bonds, including the said amount of one million seven hundred and fifty thousand dollars, now authorized to be issued, shall not exceed the sum of thirty-
71 five thousand dollars for each mile of the said road and its branch: And provided further, that all of said bonds shall first be countersigned and registered by said parties of the second part, their survivors or successors, before the same or any part thereof shall be issued.

Third. All moneys, after deducting the expenses of executing this trust, arising from the sales of said lands, are hereby sacredly pledged to the payment of said bonds, so to be issued, and of the interest coupons and warrants thereon. And all such money shall be applied by said parties of the second part, from time to time, as they shall receive the same, first to the payment of the interest coupons or warrants annexed to said bonds, as fast as the same shall become due and payable; second, in purchasing and cancelling such outstanding bonds as can be obtained at their market-value, not exceeding, however, a premium of ten per cent.; and, third, to the payment of such of the bonds themselves as may not have been purchased in accordance with the foregoing provision, when the same shall become due and payable; but it is understood and agreed that all the current net earnings and income of the road of said party of the first part, after deducting current expenses, shall be appropriated and used from time to time, if necessary, in the payment of the interest on said bonds.

Fourth. If there shall at any time be a default in the payment of interest or principal upon said bonds, and continue for six months after the same shall become due, the parties of the second part are authorized and empowered, in their discretion, to sell at public auction, after
72 notice published for three months in one or more newspapers in New York, Saint Paul, and such other place as they may designate, so much of said lands as shall be necessary to pay and satisfy such liabilities; or they may proceed as hereinbefore provided. And if sufficient money shall not be realized from such sales of land, then said parties of the second part may proceed, in the manner hereinbefore provided, to sell the entire road and franchises, or other property or lands, or so much thereof as may be necessary to pay and satisfy such bonds or so much as may be due thereon.

Fifth. All the trust moneys which shall come into the hands of the

parties of the second part, until the same shall be used or applied, in accordance with the provisions herein contained, shall be invested in Minnesota State bonds, bearing seven per cent. interest, the interest on such investment to be applied in payment of the interest accruing on the bonds of this company, and the State bonds to be retained as an offset to the bonds of this company, till they shall become due or exchanged for the same, as shall best advance the interests of the company and the bondholders.

Sixth. Said lands, thus granted as aforesaid, except the portion thereof occupied and used, or that may now or hereafter be required to be used and occupied for the roadway, depots, and other purposes incident and convenient to the proper working of said road, shall be carefully valued and appraised by the said party of the first part, its officers and agents, in divisions and parcels, as may seem to them most expedient for effecting a sale thereof, which allotments and valuations shall be made in writing from time to time, as may be found convenient and practicable, and shall be subject to the approval of said parties of the second part; and upon such approval, duplicates thereof shall be deposited and filed with the parties of the second part, and also with the treasurer of the party of the first part, which said allotments and valuations may be varied and changed from time to time, by the party
73 of the first part, as the value of the lands may be enhanced or depreciated.

Seventh. The party of the first part shall at all times be at liberty to contract for the sale of any parcel or parcels of said land at such prices as to them shall appear fair and reasonable, and shall receive in payment thereof cash, or any of the bonds aforesaid at the par valuation thereof; and upon the payment of such cash, or surrender of such bonds to said parties of the second part, said parties of the second part shall, by proper deeds or instruments, executed by them or their duly-authorized agent or attorney, grant and convey such parcel or parcels of land to the purchaser or purchasers thereof, by full and sufficient deeds, in terms of general warrantee; and said deeds shall invest said purchasers with the complete title, free and clear of all incumbrances on account of the issue of said bonds, and shall include as well the title of the company as of the trustees aforesaid. Whenever any of said lands shall be paid for in full, if in money, said money shall at once be invested in the bonds of the company; and if with bonds, said trustees shall enter on the face of the deed given for any piece or parcel of land, the number and series of the bond or bonds which have been canceled, in payment for such land, and shall also endorse on the bond or bonds the particular tract, piece, or parcel of land in payment for which said bond or bonds were canceled. The same course shall be pursued when any part of said lands are paid for in the bonds of the company: Provided, however, That where the bonds of the company cannot be procured, such reference shall be made to the State bond purchased in lieu of such bond of the company; and when the State bond is surrendered in payment for the bonds of the company, such endorsement shall be made on such bonds of the company, which shall then be canceled.

Eighth. The parties of the second part shall have full power, from time to time, to employ such clerks and assistants as they shall find necessary to enable them to discharge properly the duties devolving upon them under the provisions of this instrument; and they shall also have power and be at liberty to appoint an agent or attorney to execute conveyances of said lands, and to act generally on their behalf, and
74 from time to time to remove such agent, and appoint another in

his place; and all conveyances executed by such agent or attorney, and other acts performed within the scope of his power, shall be legal and valid, in the same manner as if executed or done by the parties of the second part.

Ninth. After all the bonds have been paid and liquidated, and the interest thereon fully satisfied and paid, for the payment and liquidation of which this trust has been created, and not till then, said trust shall cease and determine, and every matter and thing therein contained shall become utterly null and void; and all property, real estate, and equitable interests then held or claimed by said trustees under this deed, shall at once revert to and re-invest in said company as fully and perfectly as if this deed of trust had never been executed: Provided, however, That three months' public notice of the cessation of said trust shall first be given in at least two daily papers published in the State of Minnesota and in the city of New York.

It is distinctly understood and agreed that all the grants and transfers by this indenture made are made to and accepted by said parties of the second part, subject to the lien now held or which may hereafter be acquired by the State of Minnesota, upon the net profits of the railroad of the said party of the first part, and also upon the first two hundred and forty sections of the land so as aforesaid granted to said party of the first part, which it may be authorized to sell, under and by virtue of the provisions of the acts of Congress and of the legislative assembly of the late Territory of Minnesota, hereinbefore cited, as security for the payment and redemption of the bonds of the State of Minnesota, which may be issued and delivered by said State to the said party of the first part under and by virtue of the provisions of an act of the legislature of said State, approved on the ninth day of
75 March, A. D. 1858, entitled "An act proposing an amendment to section two, article nine, of the constitution, and providing for the submission of the same to the people," and also for the payment of the interest on said bonds; provided, however, that the total amount of said State bonds, in favor of which said prior lien is hereby acknowledged, shall not exceed, in the aggregate, the sum of twelve hundred and fifty thousand dollars.

It is mutually agreed, as the condition on which the parties of the second part have assented to these presents, that they shall not be responsible for the acts or defaults of each other, nor for the fault or misconduct of the agents by them employed, and shall be bound to the exercise of ordinary diligence only.

And it is further provided, that in case of a vacancy shall happen in the number of trustees, by death, resignation, removal, permanent disability, or otherwise, of one of said trustees, or their successors, from time to time, the remaining trustees shall, while said vacancy exists, have all the rights, exercise all the powers, and discharge all the duties devolving on all the said trustees by this instrument; but as soon as it conveniently can be done, such vacancy shall be filled by the nomination by the remaining trustees of some proper person to fill such vacancy, which nomination shall be made and presented by said remaining trustees to the supreme or superior courts in the city of New York, or to the supreme or any district court of Minnesota, twenty days' previous notice in writing of which nomination shall be given to the president of said party of the first part; and if such nomination shall be approved by the court, the person so nominated and approved shall at once become a trustee under this instrument. If such nomination is not approved by the court to which it shall be made, another person

76 shall be nominated by said remaining trustees, with like notice as aforesaid, and so on until a nomination is made which shall be approved; provided, however, that at least one of said trustees shall always be a citizen of the State of Minnesota. Any trustee may resign his trust, and thenceforward be discharged from all further duty and obligation in relation to it, provided that such resignation shall not take effect until after at least sixty days' notice in writing shall have been given to the president or secretary of said party of the first part.

And it is further provided, that a majority in the interest of the holders of bonds issued in pursuance hereof, and outstanding at any time, may, whenever they think proper, apply to either of the aforesaid courts for the removal of either or all of said trustees or their successors, and for the appointment of some other suitable person or persons in their stead, and the person or persons that may be so appointed by the court, on the application of said bondholders, upon a certified copy of the order of court making such appointment or appointments, being filed with the secretary of said party of the first part, shall become a trustee or trustees under this instrument, and from thenceforth this grant shall operate in favor of the person or persons so constituted and appointed trustees, to the same extent as this indenture operates in favor of said parties of the second part named therein; and said person or persons thus appointed shall notify the party or parties of the second part hereto, of his or their said appointment, either personally or through the post-office, by letter, properly directed; and such person or persons thus appointed trustees shall thereafter possess all the powers, rights, privileges, and estate vested by this instrument in the said party or parties of the second part, as the case may be, and shall become his or their successor or successors to all intents and purposes whatsoever.

The said party of the first part will, from time to time, pay to said trustees a fair compensation for the services rendered by each, and all such costs, charges, and expenses as they may sustain or be put to in the execution of this trust, and keep them fully indemnified in the premises, or failing to do so, said trustees may pay themselves out of any moneys which may come into their hands.

77 Any act or thing required by this indenture to be performed by the parties of the second part, or their successors, shall be valid and binding, if done or performed by any two of their number, except the appointment of agents and attorneys to convey lands, which shall be the joint act of all the trustees for the time being, and may be revoked at any time by any one of said trustees.

In witness whereof, the parties to these presents have hereunto, and to three other original indentures of the same tenor in all respects as this, interchangeably set their seals, (the party of the first part its corporate seal,) and have signed the same, the party of the first part by its president and secretary, the day and year first above written.

The Minnesota and Pacific Railroad Company,
By EDMUND RICE,
President.

[SEAL OF THE COMPANY.]

JAMES W. TAYLOR,
Secretary Minnesota and Pacific R. R. Co.

ELON FARNSWORTH. [SEAL.]
EDWARD P. COWLES. [SEAL.]
WILLIAM H. WELCH. [SEAL.]
Trustees.

Executed and delivered in presence of—
JOHN M. BARBOUR.
WM. R. L. WARD.

Which said trust-deed was then and there delivered by the said company to your orators and said William H. Welch, the trustees therein named and constituted, and thereupon, then and there, your orators, and the said Welch, and each of them, accepted the said deed and executed the same, as parties of the second part thereto, and accepted the trusts in and by the said deed created and reposed in them, and which said trust-deed your orators are ready to produce as your honors shall direct.

And after the execution and acceptance of said deed of trust as aforesaid, on the same day thereof, the said company in its corporate capacity and character, by its said corporate name, and under its cor-
78 porate seal, in accordance with the provisions of said deed, made and executed nine hundred bonds of the said company, of the denomination of one thousand dollars each, in and by each of which the said company acknowledged itself to be indebted to the bearer thereof in the sum of one thousand dollars, for money borrowed for the construction and equipment of its said road; which said bonds bear date of and were executed upon the said thirty-first day of July, eighteen hundred and fifty-eight, and are payable at the office of said company, in the city of New York, on the first day of August, eighteen hundred and eighty-three, with interest at the rate of seven per cent. per annum, payable in semi-annual installments, at said office, on the first days of February and August in each year, on presentation and delivery of the interest warrants or coupons thereto annexed. And to each of said bonds were annexed fifty such coupons for interest, numbered consecutively from one to fifty inclusive, all of like tenor and form; those numbered one became due and payable on the first day of February, 1859; those numbered two, on the first day of August, 1859; those numbered three, on the first day of February, 1860, and so mutatis mutandis, to the last; the coupons of each succeeding and increasing number becoming due and payable six months after the preceding number; which said bonds and all the bonds of the same series hereinafter mentioned, together with the coupons thereto annexed, were made, executed, and issued pursuant to and in all things as prescribed by the board of directors of said company, by resolution by them first duly adopted.

And afterwards, on or about the same day, your orators, and the said William H. Welch, as trustees as aforesaid, countersigned and registered all and each of the said bonds, of which said bonds and coupons the following are copies, to wit:

79 THE UNITED STATES OF AMERICA,
State of Minnesota:

The Minnesota and Pacific Railroad Company.

$1,000.] No. ——247. [$1,000.

Know all men by these presents, that the Minnesota and Pacific Railroad Company is indebted to the bearer hereof in the sum of one thousand dollars, lawful money of the United States of America, for money borrowed for the construction and equipment of its road from Stillwater, by way of Saint Paul and Saint Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood River, and from Saint Anthony, via Anoka, Saint Cloud, and Crow Wing, to Saint Vincent, near the mouth of Pembina River; and in consideration of such indebtedness the said Minnesota and Pacific Railroad Company promises and agrees

to pay the bearer hereof, on the first day of August, in the year 1883, at the office of the company, in the city of New York, the said sum of one thousand dollars, with interest at the rate of seven per centum per annum, payable at the said office of the company, in the city of New York, in semi-annual installments, on the first days of February and August in each year, on presentation and delivery of the interest-warrants or coupons hereto annexed.

This is one of a series of first-mortgage bonds, all of the same tenor, and numbered from one to twenty-three thousand respectively, which make in the aggregate the sum of twenty-three million dollars, to secure the payment of all which bonds a deed of trust has been executed by said railroad company to Elon Farnsworth, Edward P. Cowles, and William H. Welch, conveying all such interest as said railroad company has acquired, or may hereafter acquire, in all the lands granted to said railroad company, by an act of the legislative assembly of the late Territory of Minnesota, approved on the twenty-second day of May, A. D. 1857, entitled an act to execute the trust created by an act of Congress, (entitled an act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, &c.,) approved March 3d, 1857, so far as the lands granted by said act of the legislative assembly of the late Territory of
80 Minnesota are applicable to the construction of the road of said railroad company from Stillwater, by way of St. Paul and St. Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood River, and from St. Anthony, via Anoka, Saint Cloud, and Crow Wing, to St. Vincent, near the mouth of the Pembina River, estimated to be about two million four hundred and sixty-seven thousand six hundred acres of land in all; and also conveying all such interest as said railroad company has acquired, or may hereafter acquire, in said road as above described, with all the equipments and other things pertaining to said road, reference to which trust-deed, bearing date the 31st day of July, A. D. 1858, and reciting the said acts of Congress and the legislative assembly of the late Territory of Minnesota, is hereby had and made for a more full description of said lands, road, and other property, and the interest thereby conveyed to said trustees. This bond, however, is not to be considered as secured by said trust-deed unless the same shall have been registered and countersigned by said trustees, their survivors or successors. In witness whereof the said railroad company hath hereto affixed its corporate seal, with the names of its president and secretary, the 31st day of July, in the year of our Lord one thousand eight hundred and fifty-eight.

EDMUND RICE, *President.*
JAMES W. TAYLOR,
Secretary.

Registered and countersigned by the trustees.

[CORPORATE SEAL.]

ELON FARNSWORTH,
EDWARD P. COWLES,
WILLIAM H. WELCH,
Trustees.

$35.] [$35.

The Minnesota and Pacific Railroad Company will pay the bearer hereof, at their office, in the city of New York, thirty-five dollars on the

first day of August, 1862, it being the interest to that date on their bond No. 247, for $1,000.

For the company,

JAMES W. TAYLOR,
Secretary.

81 And afterwards the said bonds, with coupons annexed thereto, so as aforesaid countersigned and registered by your orators and said Welch, trustees as aforesaid, were all delivered by them to the said company, in quantities and at the times following, to wit: One hundred, being those numbered 1 to 100, both inclusive, on the 28th day of September, 1858. Three hundred, being those numbered from 401 to 700, both inclusive, on the 12th day of October, 1858. One hundred and twenty-five, being those numbered from 201 to 225, both inclusive, and those numbered from 301 to 400, both inclusive, on the 29th day of November, 1858. Two hundred, being those numbered from 101 to 200, both inclusive, 226 to 300, both inclusive, and 701 to 725, both inclusive, on the 21st day of April, 1859. Twenty-five, being those numbered from 876 to 900, both inclusive, on the 27th day of October, 1859, and one hundred and fifty, being those numbered 726 to 875, both inclusive, on the 15th day of November, 1859.

And your orators say that at the time said trust-deed was executed, as aforesaid, there was no other deed of trust, mortgage, or incumbrance of the lands, property, rights, or franchises therein described and conveyed; and the said trust-deed then was and now is a first lien and incumbrance of and upon all and singular the said lands, property, and franchises of said company, to secure the payment of the aforesaid bonds, with interest, together with the bonds of the same series afterwards issued, as hereinafter set forth.

And afterwards one hundred and fifty-eight more of the same series of bonds and coupons mentioned in and secured by said deed of trust, and bearing even date therewith, were duly made and executed by said company, and duly countersigned and registered by your orators
82 and said Welch, and by them delivered to said company, and by it duly issued, paid out, and delivered to its creditors, for and in payment of money advanced to it for the use and construction of its said roads, and for labor and services performed in and about such construction.

And a large number of the said bonds were issued and delivered to creditors of the said company in payment of debts due from it to them prior to the twenty-seventh day of November, A. D. 1858, as hereinafter set forth.

And eighth. On the twelfth day of August, eighteen hundred and fifty-eight, the legislature of Minn'sota passed an act, (which is published in the General Laws for that year, on pages 178, &c.,) and which act is as follows:

An act concerning land grant railroads.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. Each and every railroad company entitled to and accepting the loan of State credit authorized by section X of article nine of the constitution, shall make due provision for the punctual payment of the interest and final redemption of the Minnesota railroad bonds, issued to such company by the State, and to this end every such

railroad company shall provide and arrange that semi-annual payments of interest and final payments of the principal of the first-mortgage bonds of any such railroad company which may be or shall have been transferred to this State on the roads, lands, and franchises of any such company, corresponding to the State bonds to such company issued, shall mature and be payable at least sixty days before the maturity of the principal or interest of the Minnesota State railroad bonds issued and delivered, or to be issued and delivered, to such company; and the interest and principal of said railroad bonds which may have been transferred to the State shall be paid at the maturity thereof to the treasurer of the State, together with such amount as may be necessary to pay all exchanges or expenses in payment of the ensuing installments, or interest or principal, of the Minnesota State railroad bonds, issued for the benefit or use of such railroad company. And all such railroad companies, claiming or receiving State aid, shall further make due provision that all necessary expenses or charges incurred to carry out the provisions of this enactment, and the
83 provisions of the said section ten, article nine, of the constitution, authorizing and having reference to a loan of State credit to railroads, shall be borne and paid pro rata by such railroad companies as may receive the benefits thereof, and shall not be chargeable to the State.

SEC. 2. Whenever any default shall occur in the payment of interest or principal of the railroad bonds transferred to the State, so that no provision shall be made by the said railroad companies, as aforesaid, for the ensuing payment of the interest or principal of the Minnesota State railroad bonds, sixty days before the maturity of any installment of interest or final redemption of said State railroad bonds, as herein provided, the governor shall immediately proceed to provide for such payment or payments, and to indemnify the State for such payment or payments, or responsibility, by sale of sufficient amount of the bonds of the defaulting company, or by sale of the lands pledged, or foreclosure of the mortgage or deed of trust of such defaulting company, or by all or any such means of indemnification, in the manner herein provided.

SEC. 3. The governor may, on such default, immediately advertise for thirty days, in three newspapers published in the city of New York, and in one newspaper published at the seat of government of this State, that a sufficient amount of first-mortgage bonds of such defaulting company shall be sold on the fortieth day after such default, in the city of New York, to the highest bidder, for cash, and such sale of bonds shall be made accordingly, and the proceeds thereof shall be returned to the treasury, to indemnify the State for such default, together with all costs, charges, and damages growing out of such default and sale.

SEC. 4. In case of a sale of lands to be made under and to provide for the default of any such company as aforesaid, the governor may advertise and sell the same in such parcels and at such times as shall be deemed expedient, and all such sales or conveyances shall be made by the governor and secretary of state, and shall be absolute conveyances of the title in fee, as far as the same may have been invested in any such company or in the State, and without any redemption in any company or subsequent creditor, person, or persons whomsoever; but no sales of bonds of lands shall take place if the defaulting company shall make payment of all principal and interest then due, and all expenses incurred by the State prior to the day of sale of any such railroad bonds or lands; but this provision shall not be so construed as to prevent the

governor and secretary of state, until such payment by the de-
84 faulting company, from making sales and conveyances of any parcels of lands, as aforesaid, without the consent or assistance of the defaulting company, whenever default shall occur in the provision by such company, as herein required, for any ensuing payment of interest or principal of the Minnesota State railroad bonds issued to such company.

SEC. 5. All foreclosures of the mortgage or deed of trust of any defaulting company making such default in the payment of interest or principal of the bonds of such company, and for which default a foreclosure of the mortgage or deed of trust of such company may be required or demanded, shall be made only for and on account of the default occurring, and all such foreclosure shall be by public sale of all the properties, rights, privileges, and franchises pledged in such deed of trust or mortgage for the payment of the interest and final redemption of such company's bonds, due notice having first been given of such intended sale by advertisement, in such manner and for such length of time as may be prescribed in said deed of trust or mortgage; and in case of any sale of railroad or railroads, or any part thereof, constructed or in process of construction, by any railroad company, by virtue of any trust-deed, or on foreclosure of any mortgage thereupon, the party or parties acquiring title under any such sale, and their associates, successors, or assigns, shall have and acquire thereby, and shall exercise and enjoy thereafter, all and the same rights, privileges, grants, franchises, immunities, and advantages in and by said mortgage or trust-deed enumerated and conveyed which belonged to and were enjoyed by the company making such deed or mortgage, or contracting such debts, so far as the same relate and appertain to that portion of said road, or the line thereof, mentioned and described in and conveyed by said mortgage or trust-deed, and no further, as fully and absolutely in all respects as the corporators, shareholders, officers, and agents of such company might or could have done theretofore had not such sale or foreclosure taken place. Such purchasers, their associates, successors, or assigns, may proceed to organize anew and elect directors, distribute and dispose of stock, take the same or another name, and may conduct their business generally under and in the manner provided in the charter of such railroad company, with such changes or variations in the manner and form of organization as their altered circumstances and better convenience may seem to require: Provided, however, That no greater or enlarged powers shall be exercised by the new organization than are conferred by the charter of such company.

85 "SEC. 6. The governor may at any time, during the prosecution of the work on any sections of the road entitling any company to an issue of State bonds, engage the services of practical engineers or surveyors to visit, examine, and report upon the amount and quality of all work done or being done thereon; and such engineers or surveyors shall certify, under oath, to the governor the condition and character of all such work, particularly specifying the quality, extent, and character of the grading and excavations, as well as, respectively, all mechanical structures and other appurtenances of any such road or section, and whether, in the opinion of such engineer or engineers, surveyor or surveyors, such railroad company are entitled to an issue of State bonds on account of such particular section or sections of road; but no such certificate, examination, or proof shall be deemed conclusive or final, but new surveys or examinations may be ordered or other proof

received, in the discretion and to the satisfaction of the governor, before any such State bonds shall be issued thereon.

"SEC. 7. This act shall take effect and be in force from and after its passage."

But the said last-cited act was never assented to or in any manner accepted by the said railroad company or by your orators and the said Welch, trustees, as aforesaid. And your orators aver and charge that the said act and all its provisions (except those relating to the manner in which the governor of said State, in case of default of the railroad companies, should proceed to sell the bonds of the defaulting companies, or the first two hundred and forty sections of land conveyed to the State and held in trust, as provided in and by said amendment of the constitution) were a wrongful and unauthorized interference with the contract made and entered into between said State and said company by the adoption and acceptance of said amendment, as aforesaid, and seeks to impair the obligation of said contract, and so is in vio-
86 lation of the 10th section of article 1 of the Constitution of the United States, and not binding upon the said company or its trustees, and does not, nor anything done under it, in any manner or degree affect the rights of those who become holders, as hereinafter stated, of said bonds secured by said deed of trust.

And ninth. On or about the fifth day of November, eighteen hundred and fifty-eight, the said company, by its said contractor, Chamberlain, pursuant to said contract with him, had graded and actually constructed and completed, ready for placing the superstructure thereon, thirty miles of the road of said company, and on the day last aforesaid the said company produced to the governor of said State, as required by said constitution, satisfactory evidence, which was by him received and accepted as such, verified by the affidavits of the chief engineer, treasurer, and two directors of said company, that said thirty miles of the road of said company had been actually constructed and completed ready for placing the superstructure thereon. And before that time said company had borne and paid one-fourth the expenses of engraving and preparing Minnesota State railroad bonds, which were to be exchanged for bonds of said company, as above set forth, and the said company then and there offered and tendered to said governor an instrument pledging the net profits of its road for the payment of the interest on such Minnesota State railroad bonds as should be delivered to it under said amendment of the constitution, of which instrument the following is a copy, to wit:

"*Pledge of net profits from the Minnesota and Pacific Railroad Company to the State of Minnesota.*

87 "This indenture, made and concluded at Saint Paul, in the State of Minnesota, this twenty-fifth day of October, one thousand eight hundred and fifty-eight, by and between the Minnesota and Pacific Railroad Company, a body corporate and created by an act of the legislative assembly of the late Territory of Minnesota, party of the first part, and the State of Minnesota, party of the second part, witnesseth:

"That whereas by an amendment of the constitution of the State of Minnesota, approved by the people thereof on the 15th day of April, A. D. 1858, a loan of the State credit was provided to be made by said State to certain railroad companies in manner following, to wit: 'The credit of this State shall never be given or loaned in aid of any indi-

vidual, association, or corporation, except that for the purpose of expediting the construction of the lines of railroad in aid of which the Congress of the United States has granted lands to the Territory of Minnesota, the governor shall cause to be issued and delivered to each of the companies in which said grants are vested by the legislative assembly of Minnesota the special bonds of the State, bearing interest of seven per cent. per annum, payable semi-annually in the city of New York, as a loan of public credit, to an amount not exceeding twelve hundred and fifty thousand dollars, or an aggregate amount to all of said companies not exceeding five millions of dollars;'

"And whereas it is further provided, inter alia, in said section ten or article nine of the constitution that the governor of the State shall cause the said State bonds to be issued upon the compliance by said railroad company with certain conditions-precedent, among which is enumerated the following, to wit:

" 'The governor shall demand and receive from each of the companies, before any of said bonds are issued, an instrument pledging the net profits of its road for the payment of said interest:'

" Now, therefore, the said Minnesota and Pacific Railroad Company, party of the first part, for the purpose of pledging to the State of Minnesota, the party of the second part hereto, the net profits of the railroad of the said party of the first party, pursuant to said section ten of article nine of the constitution, doth hereby obligate and bind itself, in consideration of the premises and of the sum of one dollar paid by the said party of the first part to said party of the second part,
88 the receipt whereof is hereby acknowledged, to pay or cause to be paid to the treasurer of the State of Minnesota, party of the second part, who is herein and hereby constituted and appointed the fiscal agent of said party of the first part and the party of the second part for the purpose of receiving and paying out the same, pursuant to the provisions of this instrument, at least twice in each and every year, that is to say, on the first day of April and the first day of October in each and every year, all and singular the net profits of said road of the said party of the first part, known as the 'Minnesota and Pacific Railroad,' which may have been received by the said party of the first part in operating and running said aforesaid railroad, until the bonds of the said party of the second part to be issued to said party of the first part, as provided in said amendment to the constitution of the State of Minnesota, as aforesaid, shall be paid, cancelled, and annulled.

"And it is further agreed and stipulated by the parties hereto that whenever the party of the first part shall provide and pay to the treasurer of the State of Minnesota, party of the second part, the fiscal agent of said parties hereto as aforesaid, at least sixty days prior to the first days of the months of June and December of each and every year until the bonds to be issued by said party of the second part to said party of the first part shall have been paid, cancelled, and annulled, as aforesaid, a sum of money sufficient to pay the interest-warrants attached to the said bonds of the State of Minnesota which may have been issued to the said party of the first part, said interest-warrants maturing and being payable upon the first days of the months of June and December in each and every year aforesaid, or shall pay the interest-coupons attached to the bonds of said party of the first part deposited with the governor of the State of Minnesota, party of the second part, as security for said bonds of the said party of the second part issued to said party of the first part, as the same shall mature and become payable, then such payment to the treasurer as aforesaid of the

State of Minnesota, party of the second part, shall be deemed and held to be the net profits of the railroad of the party of the first part for and during the six months immediately preceding said first days of the months of June and December of each and every year aforesaid.

"It is further stipulated and agreed by the parties to these presents that the amount of net profits of the said railroad of the party of
89 the first part hereto shall be ascertained by the certificate, under oath, of the president, treasurer, and two directors of the said 'Minnesota and Pacific Railroad Company,' but nothing herein contained shall be so contrued as to prevent the said party of the second part, by the governor of said State or his duly-authorized agent, from examining the books and records of the said party of the first part; and for the purpose of such examination of the books and records of the said part of the first part, said party of the first part hereby agrees and covenants to submit all their books and records, at the place where the same are usually kept, to the governor of said State, said party of the second part, or to his duly authorized agent, whenever they are requested for such examination; and any refusal on the part of the party of the first part to these presents to submit its books and records to the governor of said State, or to his duly-authorized agent, for examination shall be deemed prima facie evidence of fraud upon the part of the president, treasurer, and directors of the 'Minnesota and Pacific Railroad Company,' party of the first part, in certifying the amount of the net earnings of said road during the time for which such certificate purports to give the same; and it is further mutually stipulated and agreed by the parties to these presents that upon the payment by said party of the first part of the principal and interest of the bonds of the State of Minnesota to be issued to said party of the first part by said party of the second part, then, in that case, this instrument to be utterly null and void, and the same shall be cancelled and annulled without any act or deed to be done or performed by the party of the first part or the party of the second part hereto, and the net profits of said road hereby pledged, and any and all right, title, and claim thereto, shall at once revert to and re-invest in said party of the first part as fully and perfectly as if this instrument had never been executed.

"In witness whereof the party of the first part has hereunto, and to one other original indenture of the same tenor in all respects as this, set its corporate seal, and has signed the same by its president and secretary, the day and year above written.

"THE MINNESOTA AND PACIFIC RAILROAD CO.,
"By EDMUND RICE, *President.*
"JAMES W. TAYLOR, [SEAL OF THE COMPANY.]
"*Secretary.*

"Executed and delivered in the presence of—
"C. K. GREEN.
"JOHN C. ADAMS.
"GEO. H. INGRAHAM, Jr.
"WM. H. NEWTON."

90 And at the same time said company also offered and tendered to said governor a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which said company might sell under said act of Congress and the act of said legis-

lature of Minnesota of May 22d, 1857, of which conveyance the following is a copy:

"*Conveyance of two hundred and forty sections of land by the Minnesota and Pacific Railroad Company to the State of Minnesota.*

"This indenture, made this twenty-third day of November, one thousand eight hundred and fifty-eight, at the city of St. Paul, in the State of Minnesota, between the Minnesota and Pacific Railroad Company, a body corporate created by an act of the legislative assembly of the late Territory of Minnesota, hereinafter referred to, party of the first part, and the State of Minnesota, party of the second part, witnesseth:

"Whereas by an act of Congress of the United States approved March 3, one thousand eight hundred and fifty-seven, entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama to aid in the construction of a certain railroad in said State,' there was granted by the United States to the late Territory of Minnesota, for the purpose of aiding in the construction of railroads from and to certain points and places mentioned in said act, (to which reference is hereby made for a particular description thereof,) every alternate section of land designated by odd numbers for six sections in width on each side of said roads and branches, except in cases where it should appear that the United States had, when the lines or routes of said road were definitely fixed, sold any of such sections or parts of sections, or that the right of pre-emption had attached to the same, and in such cases it was provided by said act of Congress that there should be granted to said Territory, for the like purposes before mentioned, so much land, nearest to the tiers of sections above specified, in alternate sections or parts of sections, as should
91 be equal to such lands as the United States may have sold, or otherwise appropriated, or to which the rights of pre-emption may have attached, the same to be selected by any agent or agents, to be appointed by the governor of said Territory or future State of Minnesota, subject to the approval of the Secretary of the Interior, and to be located not further than fifteen miles from the line of said railroads or branches; and it being provided by said act that the lands thereby granted for and on account of said roads and branches, severally, should be exclusively applied in the construction of that road for and on account of which such lands were thereby granted, and should be disposed of only as the work progressed;

"And whereas the legislative assembly of the late Territory of Minnesota, by an act approved on the twenty-second day of May, one thousand eight hundred and fifty-seven, entitled 'An act to execute the trust created by an act of Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama to aid in the construction of a certain railroad in said State, and granting certain lands to railroad companies therein named,"' did create the party of the first part hereto a body corporate and politic, by the said name and style above given, and did grant to the party of the first part all the interest and estate then present and prospective of said Territory, and of the State which should succeed it, in or to any or all of the lands theretofore granted by the Government of the United States to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad from Still-

water, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch, via Saint Cloud and Crow Wing, to the navigable waters of the Red River of the North at Saint Vincent, near the mouth of the Pembina River, agreeably to the terms of the said act of Congress, together with all and singular the rights, privileges, and immunities conferred or intended to be conferred by said act of Congress, for aiding in the construction of said roads;

"And whereas by an act of the legislature of the State of Minnesota, approved on the ninth day of March, one thousand eight hundred
92 and fifty-eight, entitled 'An act proposing an amendment to section ten, article 9, of the constitution, and providing for the submission of the same to the people,' provision was made, in case such proposed amendment should be, in the manner and at the time therein specified, ratified by the electors of the State, for the issue and delivery to the party of the first part of the bonds of the State bearing an interest of seven per cent. per annum, payable semi-annually in the city of New York, as a loan of public credit, to an amount not exceeding twelve hundred and fifty thousand dollars;

"And whereas it was, among other things, provided by the said last-mentioned act that, as security for the punctual payment and redemption of all bonds so issued and delivered to said party of the first part, and as security for the punctual payment of the interest which should accrue thereon, the governor of the State should demand and receive from said party of the first part, among other things, a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which said party of the first part then should or thereafter might be authorized to sell, in trust for the better security of the treasury of the State from loss on said bonds;

"And whereas the said amendment proposed in and by said last-mentioned act was at the time and in the manner in such act prescribed duly ratified by the electors of the State, and thereupon duly incorporated into the constitution of the said State of Minnesota;

"And whereas the lands described in the lists or schedules hereto annexed (which lists or schedules* are marked 'A,' 'B,' and 'C,' and are prefixed, respectively, 'Township 33 north, range 26 west, of principal meridian, within the six-mile limits;' 'Township 118 north, range 36 west, of principal meridian;' 'Lands selected by the agent of the governor within the nine-mile limits, township 35 north, range 28 west, of principal meridian,' and are hereby made a part of this indenture) have, by virtue of and in accordance with said acts of Congress and of the legislative assembly of the late Territory of Minnesota, been selected by agents designated by the party of the first part, under the appointment of the governor of the State of Minnesota, and comprise the first two hundred and forty sections of land which the said party of the first part is or may be authorized to sell;

93 "And whereas it was declared in and by said act of the legislature of the State of Minnesota that said conveyance to said State of said two hundred and forty sections of land should authorize the governor and secretary of state to make conveyances of title to all or any of such lands to purchasers agreeing with the party of the first part therefor, provided that before releasing the interest of the State to such lands such sale shall be approved by the governor, but the proceeds of all such sales shall be applied to the payment of interest ac-

*The schedules are necessarily omitted from this complaint.

cruing upon the bonds in case of default of the payment of the same, and as a sinking-fund to meet any future default in the payment of interest and the principal thereof when due;

And whereas it was further provided in said last-mentioned act that in case the party of the first part shall make default in payment of either the interest or principal of the bonds issued to it by the governor as aforesaid, then the governor shall proceed, in such manner as shall be prescribed by law, to sell the lands held in trust as above, to wit, the said two hundred and forty sections of land, provided that if the party of the first part, before the day of sale, shall pay all interest and principal then due, and all expenses incurred by the State, no sale shall take place;

"And whereas by section four of an act of the legislature of the State of Minnesota entitled 'An act concerning land-grant railroads,' approved August 12, 1858, it was provided that, in case of a sale of lands to be made under and to provide for the default of the party of the first part as aforesaid, the governor may advertise and sell the same in such parcels and at such times as shall be deemed most expedient, and all such sales or conveyances shall be made by the governor and secretary of state, and shall be absolute conveyances of the title in fee, as far as the same may have been vested in the party of the first part or in the said State, and without any redemption or right of redemption in any company or subsequent creditor, person or persons whomsoever; but no sale of lands shall take place if the defaulting company shall make payment of all principal and interest then due and all expenses incurred by the State prior to the day of sale of such lands; but this provision shall not be so construed as to prevent the governor and secretary of state, until such payment by the party of the first part, from making sales and conveyances of any parcel of lands as aforesaid, without the consent or assistance of the party of the first part, whenever default shall occur by said party of the first part, as in such act required, for any ensuing payment of interest or principal of the Minnesota State railroad bonds issued to it as aforesaid:

94

"Now, therefore, this indenture witnesseth, that the party of the first part, in consideration of the premises, and of the sum of one dollar in hand paid by the party of the second part, the receipt of which is hereby acknowledged, and in consideration of the issue and delivery of the bonds aforesaid by the party of the second part to the party of the first part, and in order to secure the punctual payment and redemption of all bonds issued and delivered, or to be issued and delivered, as aforesaid, to said party of the first part, and of the interest which shall accrue thereon from time to time, as the same shall become due and payable according to the tenor and effect thereof, in such manner as to exonerate the treasury of the party of the second part from any advances of money for that purpose, hath granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, forever, all those tracts or parcels of land situate, lying, and being in the said State of Minnesota, and particularly described and enumerated in the lists and schedules hereinbefore mentioned and hereto annexed, and made a part hereof, marked schedules 'A,' 'B,' and 'C,' and prefixed respectively as follows, to wit, 'Township 33 north, range 26 west, of principal meridian, within the six-mile limits;' 'Township 118 north, range 36 west, of principal meridian;' 'Lands selected by the agent of the governor within the nine-mile limits, township 35 north, range 28 west, of principal meridian,' which

lands are respectively situated within the sections, townships, and ranges mentioned in said lists or schedules, and have been selected in the manner required as aforesaid, and comprise the first two hundred and forty sections of land which the party of the first part, by virtue of said acts of Congress and of the legislative assembly of the late Territory of Minnesota, is or may be authorized to sell:

"To have and to hold the said above-granted premises, with the appurtenances, unto the said party of the first part, on the trust and for the uses and purposes in this indenture set forth; that is to say:

95 "If the interest on the bonds so to be issued as aforesaid by the party of the second part shall not be punctually paid by the party of the first part when the same shall from time to time fall due, or if the principal of such bonds, or of any thereof, shall not be punctually paid and redeemed by the party of the first part when the same shall become due and demandable according to the tenor and effect of said bonds, then, and in either case, it shall be lawful for the party of the second part, its authorized officers or agents, to take possession of all and singular the said lands and premises hereby granted and conveyed, or expressed, or intended to be so, and to sell the same at public sale at such place as shall be by the governor of the State deemed most expedient, in the manner hereinafter mentioned, in such parcels and at such times as shall, by the said party of the second part, be deemed most expedient, and out of the proceeds of such sale or sales to pay the amount of principal and interest of said bonds so then in default.

"In case of a sale of lands to be made under and by virtue of this indenture, and to provide for any default as aforesaid in the payment of the principal or interest of said bonds, the governor of the State of Minnesota may advertise and sell said lands in such parcels and at such times as shall be deemed most expedient; but such advertisement shall be made in at least two daily newspapers published in the city of New York, and one in the city of Saint Paul, for at least sixty days immediately prior to such sale.

"All such sales and all conveyances of such lands shall be made by the governor and secretary of state, without the consent or assistance of the party of the first part, and such conveyances shall be absolute conveyances of the title, in fee, as far as the same may have been vested in any such company, to wit, in the party of the first part or in the State, and without any redemption or right of redemption in the party of the first part, or in any subsequent creditor, person or persons whomsoever: provided, however, that if the party of the first part, in default as aforesaid, shall, before the day of such sale, pay all the interest or principal then due on said bonds and all expenses incurred by the State in consequence of such default, no sale shall take place.

"It is understood and agreed that, notwithstanding this in-
96 denture, the party of the first part may at any time, or from time to time, agree with any person or persons for the sale to him or them of any of the lands hereby granted, or intended so to be, and for making conveyances of title to any such person or persons; and the governor and secretary of state of Minnesota are hereby authorized to make conveyances of title to all or any of such lands so purchased to the purchasers: provided, that before releasing the interest of the State to such lands, such sale or sales shall be approved by the governor; but the proceeds of all such sales shall be applied to the payment of interest accruing upon the said bonds in case of default of the payment of the same, and as a sinking-fund to meet any further default in the payment of interest and the principal thereof when due.

"And the said party of the first part hereby covenants and agrees, to and with the party of the second part, that the party of the first part shall and will, at any time or times hereafter, upon the reasonable request of the said party of the second part, or of the governor of the State, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable acts, conveyances, and assurances in the law needful or proper for the better and more effectually vesting and confirming to the party of the second part, upon the trusts herein contained, the premises hereby intended to be granted, to wit, the first two hundred and forty sections of land which the party of the first part is or may be authorized to sell by virtue of said acts of Congress, and of the legislative assembly of the late Territory of Minnesota, as by the said party of the second part, its governor, or counsel learned in law, shall be reasonably decided, advised, or required.

"And the party of the first part further covenants and agrees, to and with the party of the second part, that if, upon the final allotment of lands to the party of the first part by the General Land-Office of the United States, any deficiency shall exist over and above such portions of the lands described in the annexed schedule as shall be so allotted to it, in order to make up the two hundred and forty sections of land, a conveyance of which, by the aforesaid provision of the constitution of the State of Minnesota, is required to be made to the party of the second part by the party of the first part as security upon the issue and
97 delivery to it of said State bonds, such deficiency will, on the request of the governor of the State, be supplied by the conveyance by the party of the first part of the requisite quantity of other lands which it may be authorized to sell as aforesaid, to be selected under the direction of the governor and subject to his approval.

"And the party of the first part further covenants and agrees, to and with the party of the second part, that if, upon the final allotment of lands to the party of the first part by the General Land-Office of the United States, the said lands specified in the schedule hereunto attached, or any portion of them, shall not be assigned to the said party of the first part, then the said party of the first part will, upon the request of the governor of Minnesota, execute and deliver to the said party of the second part a good and sufficient conveyance of such other lands as may be so allotted to it, and which it may be authorized to sell as aforesaid, of equal and average quality and value, not exceeding two hundred and forty sections, (entire, not fractional,) to be selected under the direction of the governor, and subject to his approval, so that in any case the full amount of two hundred and forty entire sections of said lands shall be secured to the said party of the second part by the said party of the first part, in and by the terms of this conveyance, to be selected as hereinbefore mentioned.

"It is further herein provided that when the principal and interest of the bonds for securing the payment and redemption of which this indenture is made shall be fully paid and redeemed, the trust hereby created shall cease and determine, and all the lands, moneys, and property then claimed or held by the party of the second part, which shall have been received by and become vested in it under and by virtue of this indenture, shall at once revert to and re-invest in said party of the first part, its successors or assigns, as fully and completely as if this indenture had never been executed.

"In witness whereof, the party of the first part hath hereunto, and to one other original indenture of like tenor in all respects with this, caused

to be affixed its corporate seal, and hath signed the same by its
98 president and secretary, the day and year first above written.

"THE MINNESOTA AND PACIFIC RAILROAD COMPANY,
"By R. R. NELSON,
"*Acting President.*

[SEAL OF THE COMPANY.]

"JAMES W. TAYLOR,
"*Secretary Minnesota and Pacific R. R. Co.*

"In presence of—
"WM. H. ACKER.
"GEO. H. INGRAHAM, Jr."

And said company then and there offered and tendered to said governor, and offered to transfer to the treasurer of the State, three hundred —being three hundred thousand dollars in amount—of the said first-mortgage bonds of said company of the series hereinbefore referred to, with all the coupons attached, secured by the said deed of trust of the roads, lands, and franchises of said company, which said deed of trust the said company then filed for record with the secretary of state of said State of Minnesota, where the same now remains.

And thereupon, then and there, the said company requested the said governor to cause to be issued and delivered to it, the said company, in accordance with the said amendment to the constitution, "Minnesota State railroad bonds" to the amount of three hundred thousand dollars. But the said governor then and there refused so to issue and deliver, or cause to be issued and delivered, to said company the said amount or any amount whatever of such State bonds, unless and until the said company should comply with his wishes and demands as the same are set forth and stated in a letter addressed and delivered by the said then governor of said State to the secretary of said company, of which the following is a copy:

99 "EXECUTIVE OFFICE, MINN.,
"*St. Paul, November 5th*, 1858.

"JAMES W. TAYLOR, Esq.,
"*Secretary Minnesota and Pacific Railroad Company:*

"SIR: Your communication addressed to me by order of the board of directors of the railroad company of which you are secretary has been received, together with certain documents purporting to be—

"A trust-deed from the said company to certain individuals, executed in pursuance of section 21 of chapter 1 of an act of the legislative assembly of Minnesota, approved May 22d, 1857, entitled 'An act to execute the trust created by an act of Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State," and granting certain lands to railroad companies therein named;'

"Also an instrument pledging the net profits of its road, as prescribed in section 10, article 9 of the constitution;

"Also a conveyance by said company to the State of Minnesota of two hundred and forty sections of land, as prescribed in said section 10, article 9 of the constitution;

"Also the evidences of the construction and completion of thirty miles of road ready for the superstructures by the Minnesota and Pacific Railroad Company;

"Together with certain papers, said to be three hundred first-mortgage bonds of said Minnesota and Pacific Railroad Company, executed in accordance with the terms of said trust-deed.

"Upon a hasty examination of the trust-deed, I perceive that it does not comply with the governor's construction of the amendment to the constitution authorizing the loan of State credit, in providing for a priority of lien upon the property of the company, of every description, for the bonds issued or to be issued by the company to the State, to correspond with the 'Minnesota State railroad-bonds,' which the governor is required by law to deliver to the said company upon
100 certain conditions; consequently I decline to deliver any of the said State bonds to the company until that provision, which I deem to be of primary importance, is inserted in the said trust-deed.

"I have not deemed it necessary to examine the other documents informally placed in this office, as they cannot be received by me as a basis upon which the State bonds are to be issued until the trust-deed is amended in the manner I have above indicated.

"That you may be officially notified of the requirements of the governor as a condition to the delivery of the State bonds to the respective railroad companies, I enclose herewith a copy from the executive journal of such requirements, entered upon the fourth day of August last, and which have been substantially adhered to in issuing State bonds to those railroad companies to whom they have hitherto been delivered.

"Very respectfully, your obedient servant,

(Signed) "HENRY H. SIBLEY."

The following is a copy of the entry in the executive journal, referred to in the above letter, and which was first called to the attention and knowledge of said company by said letter, and the copy of same therewith sent to said company:

"EXECUTIVE OFFICE, MINN.,
"*St. Paul, Aug. 4th*, 1858.

"The railroad companies will be required, before receiving the bonds of the State—

"First. To show to the satisfaction of the governor that they have fully complied with the preliminaries of the law with reference to the time of commencement of the work within the sixty days, &c., &c.

"Second. That ten miles of the road have been graded in a good and substantial manner, with bridges, culverts, &c., completed, ready for receiving the superstructures, and that the work has been performed in relation to the termini so as to show a bona-fide intention to complete the work.

101 "Third. To deliver to the governor an instrument duly executed and acknowledged, containing an obligation binding in law upon the several companies, to secure to the State for the payment of interest upon her bonds the net profits of each road.

"Also a conveyance to the State, in such manner and form as may be prescribed by the governor, of the first two hundred and forty sections of land which each company may receive from the grant, free from all prior incumbrances, and which shall embody a covenant that the land shall be fairly and equitably selected immediately after the respective companies shall have secured the title thereto, to the satisfaction of the governor.

"Also, a deposit of first-mortgage bonds of each company made to the State, based upon a deed of trust to the State equal in amount to the

State bonds issued to such company, which deed of trust shall specify priority of lien to such bonds as the company may deliver to the State in exchange for the bonds.

"The form of the deed of trust shall be submitted to the governor for his approval, as well with reference to its general contents as to the security to the State contained therein.

(Signed) "HENRY H. SIBLEY."

And the said company then and there protested against said extra-constitutional and illegal demands of said governor, as in violation of the rights of said company, and prejudicial to, and in violation of, the rights and interest of its creditors, and denied his authority or right to insist upon them, and refused to comply therewith.

And tenth. Upon such refusal by said governor, as aforesaid, and his insisting upon a compliance with the terms dictated by him as aforesaid, as a condition-precedent to the delivery of any of said State railroad bonds to said company, the said governor agreed with said company that if it would institute proceedings by mandamus against
102 him, in the supreme court of said State, to obtain the opinion and decision of the said court upon the question whether the said company was entitled under said constitutional amendment to demand and receive said State bonds, upon such papers and securities as it had so as aforesaid tendered to him, or whether it was bound in law to comply with the terms and requirements demanded by him, as aforesaid, he would appear and submit himself and the said State to the jurisdiction and process of said court, and the said matters to its adjudication, and abide by its decision and its construction of said constitution. And thereupon the said company, pursuant to the statutes of Minnesota and said agreement with said governor, made an application to the said supreme court for a writ of peremptory mandamus to compel the said governor to issue such State bonds to said company, so as aforesaid demanded by it, upon the same papers and securities, and no other, which had been so as aforesaid offered and tendered to said governor, and which are the same papers and securities hereinbefore set forth.

And thereupon, in the matter of the said application, the said governor appeared as a party defendant in said court, and the attorney-general of said State appeared on the part of said State, and was then and there heard by said court, upon the questions involved upon such application, in opposition to such application, and he then and there, on the part of said governor, as also on the part of said State, submitted the said matters to the decision and judgment of the said court. And said attorney-general and said governor then and there, in open court, admitted that the said company had strictly complied with the provisions of its charter, and of the constitution, in all save that the
103 trust-deed given to secure its first-mortgage bonds did not express a preference as to such bonds as might be transferred to the State—which is the same deed hereinafter set forth.

And afterwards, on the tenth day of November, eighteen hundred and fifty-eight, the said court rendered its decision and judgment therein, and decided and adjudged that—

"They (the framers of the said constitutional amendment) evidently intended to provide the State with an exclusive lien on the net profits of the road, and the control of the first two hundred and forty sections of land, and to place her on an equal footing only, with other creditors, as to the bonds received from the companies."

And that "the said company had done all that was necessary under

the constitution to entitle it to the amount of State bonds it had demanded, as aforesaid." And it awarded a peremptory writ of mandamus against the said governor, and directed that it be served upon him by the clerk of said court, or any other disinterested person.

(The official report of which application and decision is in 2d Minn. Rep., in pages 18, &c.)

And such writ was in fact served upon said governor on the twelfth day of November, eighteen hundred and fifty-eight, and the following entry and record thereof was then made by said governor in the executive journal of said State, and still remains of record, to wit:

"NOVEMBER 12*th*, 1858.

"A writ of peremptory mandamus was this day served upon the governor from the supreme court, requiring him to issue to the Minnesota and Pacific Railroad Company $300,000, in 'Minnesota State
104 Railroad bonds,' without requiring a priority of lien for the bonds of the said company to be deposited with the treasurer of the State over all others as heretofore (August 4th, 1858, folio 30) made a prerequisite by the governor for the issue of the State bonds by him."

And eleventh. After the rendition of said judgment of said supreme court, to wit, on the seventeenth day of said month of November, eighteen hundred and fifty-eight, the said company purchased, from one James M. Winslow, nineteen lots, and part of a lot, of land in the city of Saint Paul, Minnesota, for the use, and which were necessary for the use and occupancy of said company, by and for its said railroad at that place, the price and consideration for which was the sum of thirteen thousand dollars. And the said Winslow, upon the faith and credit of said decision of said supreme court, agreed to accept, and did accept, payment of the whole of said consideration money in the said first-mortgage bonds of said company at their par value. And thereupon, on the day last aforesaid, said Winslow and his wife conveyed the said lands to said company, by a good and sufficient warrantee deed, duly executed, acknowledged, and delivered. And on the same day, in consideration aforesaid, the said company delivered thirteen of its said mortgage-bonds, with all the coupons thereto attached, to said Winslow; which said bonds and coupons are still outstanding and wholly unpaid, though a large number of said coupons, for interest, thereto attached, have long been due. And the said company, and its successors, the said Saint Paul and Pacific Railroad Company, and the said first division of the Saint Paul and Pacific Railroad Company, and other defendants,
105 have ever since retained, and do now retain, the title, possession, use, and occupancy of said lands.

Yet, although the said governor had appeared upon said application for said writ of mandamus, and submitted himself and the State of Minnesota, as aforesaid, to the jurisdiction of said court, and the said matters in dispute to its decision, he afterwards refused, under a claim of executive prerogative and privilege, to abide by said decision of said court, or to obey said writ of mandamus according to the terms and mandate of the same; but then made new conditions and requirements, which he demanded should be complied with and obeyed by said company, as conditions precedent to be performed before he would obey said writ, among which conditions were, that the said company and the said trustees should execute and deliver to him a supplement to the said deed of trust of July 31st, 1858, hereinbefore set forth, a copy of which supplement is hereinafter set forth.

And at or about the same time, the said governor made it a further

and additional condition of the issue and delivery to said company of any of said State bonds, that the said company should then and there execute and deliver to him, the said governor, a stipulation in writing, that only one-half of the State bonds, to which the said company might become entitled under and according to the said constitutional amendment, should be drawn by it upon account of the grading and constructing and completing its road ready for placing the superstructure thereon.

That at the time of said refusal by said governor, and his said demand for said supplement and stipulation, the said company was largely
106 indebted to a large number of persons for money, amounting to over forty thousand dollars, borrowed by it from them, in the year eighteen hundred and fifty-seven, to pay for the surveys, locations, and other work, in and about the construction of said road; and also in divers other larger sums to divers persons, for goods, merchandise, and materials, delivered and furnished, money lent and advanced, and work, labor, and services performed for the said company in the surveying and locating said road, and in the construction thereof, as hereinbefore set forth. That relying upon the plighted faith and credit of the State of Minnesota, the said company had agreed to and with its principal creditors aforesaid, to pay the debts so due from it to them, in said Minnesota State railroad-bonds, so to be issued and delivered to it by said State, as in said constitutional amendment provided, and which it was the legal and constitutional duty of the governor of Minnesota to cause to be issued to it, from time to time, as it complied with the requirements of said constitution, upon the terms and securities therein specified and required, and without exacting any other or additional terms or securities.

And the said company at that time relied entirely upon the cash proceeds of such of said Minnesota State railroad-bonds as it might be able to negotiate and sell, to pay such debts already incurred by them as were not agreed to be paid in said Minnesota State railroad-bonds or in specie.

And long prior to the time of said demand upon said governor for the issue and delivery of said State railroad-bonds, and long before said governor had notified said company of his said construction of said amendment and his said requirements, the said company had
107 entered into the contracts with said Chamberlain hereinbefore stated, for the construction of eighty miles of its said roads ready for the rolling-stock, by the terms of which contracts said company had agreed to pay said Chamberlain one million of dollars in Minnesota State railroad-bonds aforesaid; and at the time of said refusal by said governor, and his said demand for the said supplement and the said stipulation as conditions-precedent to the said company receiving any of said State bonds, the said company was (in addition to the debts above stated) also justly indebted to said Chamberlain for work done by him under said contract, in the sum of three hundred thousand dollars, payable as aforesaid, in the said Minnesota State railroad-bonds, which said company relied upon receiving from said State as aforesaid, and which it was then and there the legal and constitutional duty of said governor to cause to be issued and delivered to it upon the papers and securities so as aforesaid tendered; and without exaction of new terms or other and additional security; that a failure on the part of said company so to pay the said amount so due in said bonds to said Chamberlain, would have deprived said company of the benefit of said contract with him for the future, and would have subjected said company to a lawful claim on his part for heavy damages for its failure to keep and perform

said contract upon its part, and would have resulted in the immediate financial ruin and bankruptcy of said company, and the failure of the public work, with the construction and maintenance of which it was, as aforesaid, entrusted and charged.

And your orators further show unto your honors, that at said
108 time all railroad securities were very much discredited and depressed in value throughout the United States, and that all railroad companies in the Western States, and especially in the then new State of Minnesota, were very much embarrassed, pecuniarily, and in bad repute with capitalists. And under the circumstances of that period it was impossible for the said company to proceed with the construction of its said road unless it should receive the State railroad-bonds so proposed and promised to be delivered to it as a loan of the credit of said State, by and under the said amendment to the constitution. And that then there was good reason to believe, and the directors, officers, and managers of said company did then believe, that in case the said Minnesota State railroad-bonds should be promptly so delivered to it as it constructed and completed its road ready for placing the superstructure thereon in sections, as provided by said constitutional amendment, it, the said company, would thereby be enabled to go forward with the construction of its said roads, and complete the same in compliance with the requirements of its said charter and said constitutional amendment.

And thereupon, under the duress and compulsion thus by the governor of Minnesota exercised over the said company in its then critical financial condition and embarrassments, by his, said governor's, refusal to deliver to it any of said State bonds in fulfilment of the obligation of the contract entered into between said State and said company, by the adoption and acceptance of said amendment of the constitution as aforesaid, and his disobedience of said writ of mandamus of said supreme court, and his exaction, as a condition-precedent, as aforesaid, of said supplemental deed, and fearful of the effect upon the credit and
109 financial standing of said company, which would be produced by a prolonged controversy with the governor of the State, and being unable to procure any of said State bonds without compliance with said demands and exactions, and so constrained and forced by its position under said refusal of said governor, and by its circumstances, necessities, and fears, and without any consideration or other cause and under protest, the president of said company signed to said supplement the corporate name of said company and affixed thereto the corporate seal of the same, and the secretary of said company signed thereto his name as such secretary.

And afterwards, about the first of December, 1858, being strongly urged thereto by the said company, under its duress and embarrassment as aforesaid, your orators and said Welch, under protest, executed the same, which said supplement to said deed of trust is in the following words, to wit:

"This indenture, made this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and fifty-eight, between the Minnesota and Pacific Railroad Company, party of the first part, and Elon Farnsworth, of the State of Michigan; Edward P. Cowles, of the city of New York; and William H. Welch, of the State of Minnesota, parties of the second part, trustees, as hereinafter mentioned, witnesseth:

"Whereas the said party of the first part has executed to the parties of the second part, trustees as aforesaid, a trust-deed, bearing date the

thirty-first day of July, one thousand eight hundred and fifty-eight, as security for the payment of the principal and interest upon the bonds of the party of the first part, as in said trust-deed mentioned and specified;

110 "And whereas a portion of the bonds of the said the Minnesota and Pacific Railroad Company, which are secured by said trust-deed, are to be delivered to the State of Minnesota, corresponding to an amount of the bonds of the said State which shall or may be issued and delivered to said company;

"And whereas the said trustees, in and by said trust-deed, are authorized and empowered, in case of default in the payment of the interest or principal of said bonds, as therein mentioned, to make sale of all or any of the property conveyed and transferred to them, or expressed, or intended so to be, in and by said trust-deed in the manner therein specified;

"And whereas it is intended and desired that punctual payment of the interest and principal on the bonds to be delivered and held by the State, as aforesaid, shall be secured, and as a supplement to, and as a part of said trust-deed, the said trustees therein mentioned, or the survivor or survivors of them, or his or their successors in the trust thereby created, are hereby authorized and directed, in case of a default in the payment of such interest and principal, upon the demand and request of the governor of said State, as the agent of said State, to foreclose such trust-deed, and to take possession of all and singular the said premises conveyed and transferred, or expressed or intended so to be, in and by said trust-deed, and shall, upon such demand and request, sell such premises and property, or so much thereof as the said governor may direct, pursuant to the terms and provisions of said trust-deed; except that in case of such foreclosure and sale, pursuant to such demand and request as aforesaid, such sale shall be made within sixty days after such default as aforesaid shall be made, and public notice of such sale shall be given by advertisement in one daily newspaper printed and published in the city of New York, and in one daily newspaper printed and published in the city of St. Paul, for six weeks successively; and in case of the failure or refusal of the said trustees, or the survivor or survivors of them, or their successors, to comply with such demand and request of the said governor to make such foreclosure and sale as aforesaid, then the said governor of the State, as the agent of the said State, is hereby authorized and empowered to make, or cause to be made, such foreclosure and sale as aforesaid, so that said foreclosure and sale shall be

111 made within sixty days after the occurrence of any default, as aforesaid, on the part of the said company, anything in the trust-deed, or in this deed, which is supplementary thereto, to the contrary notwithstanding. And in case of the said foreclosure and sale as aforesaid, by the governor of the State, as the agent of the said State, the said governor of the State is hereby authorized and empowered, for and in the name of the said Minnesota & Pacific Railroad Company, to make, or cause to be made, good and sufficient deeds of conveyance, or other necessary instruments of transfer, of the road, lands, franchises, or other property of the said company, or any part thereof, as may be foreclosed and sold as aforesaid, which said deeds of conveyance, or other necessary instruments of transfer, as aforesaid, shall include and embrace all the rights, interest, ownership, claim, and demand of the said company, party of the first part, and of the said parties of the second part, in and to the said premises sold as aforesaid, in law and equity:

"In case of a foreclosure and sale as herein mentioned, whether by

said trustees or the said governor, the proceeds arising from such sale shall be applied to the payment of the amount due on the bonds secured by said trust-deed, as therein provided; but if such foreclosure and sale shall be made by the governor, as aforesaid, all damages, costs, charges, and expenses which said State has sustained or incurred by reason of the default aforesaid, shall be paid out of such proceeds; and in case of a foreclosure and sale by the trustees as herein provided, the costs and expenses of the same are to be paid by the said party of the first part, and not by said State.

"It is expressly understood and declared that the proviso contained in said trust-deed, 'that if a majority in interest of said bondholders shall deem such sale unadvisable, or the time named for it unfavorable to the interests of said bondholders, and if they shall, in writing, request the trustees to delay such sale, such trustees shall postpone the same to such time, not exceeding twelve months, as may be named in said writing,' shall be inapplicable and inoperative, and of no force or effect in case a foreclosure and sale shall be made by said trustees, or by said governor, as herein mentioned; and all parts and provisions of said trust-deed, and particularly those contained in the fourth term, condition, or provision, on page eleven of said trust-deed, which
112 are inconsistent or in conflict with this instrument in respect to the foreclosure and sale, whether by the said trustees, or by said governor, and the time and manner of such foreclosure and sale, as herein provided, are hereby declared to be inoperative and of no force or effect, it being the intent and design of this instrument, in the provisions in respect to the foreclosure and sale herein mentioned, to provide for and secure the punctual payment of the amount due on the bonds in said trust-deed and herein mentioned, and for this purpose this indenture is executed as a part of and as a supplement to said trust-deed.

"In witness whereof the parties to these presents have hereunto, at the city of St. Paul, in the State of Minnesota, and to three other original indentures, of the same tenor in all respects as this, interchangeably set their seals, (the party of the first part, its corporate seal,) and have signed the same, the party of the first part by its president and secretary, the day and year first above written.

"THE MINNESOTA & PACIFIC RAILROAD COMPANY,
By EDMUND RICE, *President.*

[SEAL OF THE COMPANY.]

"JAMES W. TAYLOR,
Secretary of the Minn. & Pacific R. R. Co.

"ELON FARNSWORTH. [SEAL.]
"EDWARD P. COWLES. [SEAL.]
"WILLIAM H. WELCH. [SEAL.]

"Executed and delivered in presence of—
"JOHN M. BARBOUR,
"L. WASHINGTON,
"R. MCCLELLAND,
"HENRY ACKER,
"GEORGE H. INGRAHAM, Jr.,
"To the several signatures."

And your orators aver and charge, that the said demands, acts, and exactions of the said governor were wholly without authority of law—an usurpation of power, and an illegal, wrongful, and most arbitrary

and unconscionable use of the power and influence of his high place; that the authority and duties conferred and imposed upon him by the constitution, as therein limited and defined, and as then recently interpreted and construed by the supreme judicial authority of the
113 State, as aforesaid, could not be varied, enlarged, or diminished by the said governor, by means or under color of any deed or contract; and the said so-called supplement to the trust-deed aforesaid was and is ineffectual to enlarge, diminish, qualify, or affect, in any manner or degree, the authority or duty of the governor of said State in the matters and things devolved upon him as such governor by the constitution of said State; that the rights of the holders of bonds issued under, and intended to be secured and secured by, said before-mentioned first deed of trust, some of whom had, as aforesaid, taken and received their such bonds prior to the demand for and execution of said supplement, but after said supreme court had so as aforesaid decided that the said State, as to such of those bonds as might be delivered to and held by her, stood on an "equal footing only as to security with other holders of the first-mortgage bonds of said company," could not be and are not affected by such supplement; and the said so-called supplemental deed was and is wholly void, and of no effect, and in no way operates as a modification of the said first trust-deed, or of the rights of the holders of bonds issued under and secured by it, or as a modification and amendment of the said constitutional amendment, or as any change of the authority or duties of the governor of the State thereby conferred and imposed upon him.

And under like duress, as aforesaid, the said company executed and delivered to said governor such written stipulation as he demanded as aforesaid.

And twelfth. Afterwards there was a demand by capitalists for
114 the said Minnesota State railroad bonds, to be used, as they lawfully might be, as and for a basis and security for banking and issuing currency in said State of Minnesota, under the general banking law thereof; and the governor and State auditor of said State, whose province and duty it was under such law to receive deposits of such State bonds as such basis and security for banking, and to authorize banking thereon, had received a portion of the said Minnesota State railroad-bonds, issued to each of the three other companies, who were recipients of the same under said constitutional amendment, and authorized banking and the issuing of currency thereon, at the rate of ninety-five cents on the dollar of such bonds; and this fact and use of such bonds created a great demand for them and gave them great value and credit, and thereby made such bonds a means of aiding said companies in the construction of their several roads, as was intended by said constitutional amendment.

And the holders of such State bonds which had been delivered to said Minnesota and Pacific Railroad Company, and by it paid out to its contractors as aforesaid, applied to the said governor and auditor to receive such bonds, also as a security and basis for banking and issuing currency as aforesaid, at the same rate as said other bonds, and upon an equal footing therewith; but the said governor and auditor then and there demanded that the said company should execute, and procure your orators and said Welch, trustees as aforesaid, to execute and deliver another and second supplement to said first deed of trust, in substance and form as is hereinafter set forth, as a condition-precedent to receiving said bonds on an equal footing with said other Minnesota State railroad-bonds, as a basis for banking and issuing currency

115 aforesaid; and the said company, so constrained by said governor and auditor, and by their necessities, and with a view to give credit and market value to said State bonds, did, on or about the 23d day of May, 1859, by its officers, execute such second supplemental deed, and requested your orators and the said Welch, as such trustees, to execute the same; but your orators and the said Welch refused to execute the same, because in their opinion the said officers of the State of Minnesota had no right to demand it, and they, the said trustees, had no right to execute it, and that the demand therefor was in derogation of the rights of those who had become holders of said first-mortgage bonds; and that the same violated the trusts reposed in them, and impaired the obligations of the contracts between the State and the said company and its bondholders, made and entered into as aforesaid, by the act of incorporation of said company and said constitutional amendment, and so your orators now aver and charge the facts to be.

The following is a copy of said second supplemental trust-deed, to wit:

"This indenture, made the twenty-third day of May, A. D. 1859, between the Minnesota and Pacific Railroad Company, a body-corporate created by an act of the legislative assembly of the late Territory of Minnesota, party of the first part, and Elon Farnsworth, of the State of Michigan, Edward P. Cowles, of the city of New York, and William H. Welch, of the State of Minnesota, parties of the second part, trustees.

"Whereas, a trust-deed was executed by and between the parties above named heretofore, on the 31st day of July, A. D. 1858, bearing date on the day last aforesaid;

"And whereas, on the 27th day of November, A. D. 1858, a supplemental deed was executed by the parties hereto, bearing date on the day last aforesaid;

116 "And whereas the executive authority of the State of Minnesota exacts of the above party of the first part additional security for the bonds of the said State, issued and to be issued to the said party under and by virtue of the provisions of section ten of article nine of the amended constitution of the said State of Minnesota:

"Now, therefore, this indenture witnesseth: That in consideration of the premises and of one dollar, the trust-deed and the supplement thereto hereinbefore referred to are hereby modified and restricted as follows, viz:

"First. The first-mortgage bonds to be issued under the said trust-deed and the supplement shall not exceed the sum of thirty thousand dollars per mile for the first sixty-two and one-half miles of the road of the said company, and of the amount so to be issued, only the amount of six hundred and twenty-five thousand dollars shall be used or circulated by the said company, and the remainder shall be reserved, to be delivered to the State of Minnesota in part security for bonds of the State, to be delivered to the said company under the provisions of the said section ten of article nine of the amended constitution. After the completion of the said first sixty-two and one-half miles, and not before, the said company may issue other first-mortgage bonds, but not to an amount exceeding the sum of thirty thousand dollars per mile, and not otherwise than as the work progresses—that is to say, an amount equal to fifteen thousand dollars per mile may be issued whenever and as often as any ten miles of the said road is made ready for the superstructure, and an amount equal to fifteen thousand dollars per mile may be issued whenever and as often as any ten miles of the said road shall be ironed:

Provided always, That (after the completion of the said sixty-two and one-half miles) the said first-mortgage bonds shall not be issued upon preparation for the superstructure alone to an amount exceeding at any one time the sum of six hundred thousand dollars before the said distance shall be ironed and operated as aforesaid in a section or sections of at least ten miles.

"Second. The State bonds of the State of Minnesota, to be hereafter issued to the Minnesota and Pacific Railroad Company under the provisions of section ten of article nine of the said amended consti-
117 tution, shall be applied for and demanded in the proportion of one-half of the grading or road-bed, and the remainder only so fast as each ten miles of iron track is laid, and the road operated as contemplated by the section aforesaid of the amended constitution.

"Third. The party of the first part shall obtain title to the right of way along the route of its road so soon as practicable.

"Fourth. Whenever any exchange shall be made of lands belonging to the party of the first part, for the first-mortgage bonds of the said party, the lands so exchanged shall not be sold at less than the sum of ten dollars per acre without the approval of the governor of the State of Minnesota.

"Fifth. The parties of the second part shall not pay more than the market-value for any of the first-mortgage bonds of the said company.

"Sixth. The neglect or refusal of any trustee to do any act properly required shall be a cause of removal by any court of record having general jurisdiction, and any vacancy occurring shall be filled by the nomination of the party applying, or exclusively by the court.

"Seventh. The provisions of this instrument, as also those contained in the said supplemented deed bearing date November 27, A. D. 1858, shall become inoperative and void whenever the State of Minnesota shall cease to be a holder of the first-mortgage bonds of the Minnesota and Pacific Railroad Company by virtue of the said section of the amended constitution.

"In witness of all which, the several parties hereto have to this, and to two like instruments of this date, interchangeably set their hands and seals the day and year first above written.

[SEAL.] "THE MINNESOTA & PACIFIC RAILROAD COMPANY,
"By EDMUND RICE,
"*President.*
"T. M. METCALF,
"*Secretary.*

"Signed, sealed, and delivered, in triplicate, in the presence of—
"LLEWELLYN WASHINGTON.
"HENRY ACKER."

And because the said second supplement to said deed of trust was not executed and delivered by your orators and said Welch, the said
118 governor and auditor refused to receive any of the said State bonds that had been issued to said Minnesota and Pacific Company, as a basis and security for banking and issuing currency at any rate of percentage or discount, or on any terms whatever, and thereby, and in consequence thereof, said bonds of the State so delivered to said company became and were greatly discredited, and of little value in the money-markets. And the same did not, as was intended by the said constitutional amendment, represent the "credit of the State of Minnesota," and were not, in fact, a loan of her credit within the true intent

and meaning of such constitutional provision, and such demand and refusal by said governor and auditor most seriously impaired the ability of the said company to construct and complete its said roads by thus making such State bonds useless and valueless in its hands.

And, thirteenth. Your orators further show that before and up to the twenty-eighth day of September, eighteen hundred and fifty-nine, the said company had actually constructed and completed, ready for placing the superstructure thereon, over sixty-two and one-half miles of its said roads, and had paid all the interest upon all its said first-mortgage bonds held by said State, which fell due on the first days of February and August, respectively, of that year, and had exonerated the treasury of the State from any advances of money on account of the interest which had become due on the State bonds issued to said company. And on the said twenty-eighth day of September, the said company duly presented and produced to the said governor of said State satisfactory evidence, verified by the affidavits of the chief engineer, treasurer, and two directors of said company, that sixty-two and one-
half miles of its said railroad had been so constructed and
119 completed. That prior to that time the said company had delivered to the treasurer of said State six hundred and twenty-five of the said first-mortgage bonds on the roads, lands, and franchises of said company, of the denomination of one thousand dollars each, and amounting in all to six hundred and twenty-five thousand dollars, and then and there presented to said governor the receipts of said treasurer therefor; that said governor then and there received said evidence of said construction and completion as satisfactory, and received said receipts of said treasurer as satisfactory evidence of the said delivery of said bonds to said treasurer; that said governor had, prior to that time, issued and delivered to the said company, upon the terms and conditions exacted by him as aforesaid, six hundred of said State bonds, amounting to six hundred thousand dollars, and no more; and on said 28th day of September, 1859, at the capital, in Saint Paul, in said State, the said company demanded of said governor that he should cause to be issued and delivered to it State bonds aforesaid to the amount of twenty-five thousand dollars, in addition to those previously so issued and delivered, being the amount to which the said company was entitled, under said constitutional amendment and said stipulation, so to receive from said governor in behalf of said State; and the said governor then and there refused so to deliver to said company said State bonds to the amount of twenty-five thousand dollars, or any other amount in addition to said six hundred before as aforesaid delivered, though the said State then and there retained and still does retain the whole of the six hundred and twenty-five thousand
dollars of the first-mortgage bonds of said company, as aforesaid
120 delivered to her. And up to this time the said company had, in all things, faithfully done, kept, performed, and discharged all the requirements, duties, obligations, and things by it to be done, kept, performed, and discharged under the said amendment to the constitution, and its acceptance thereof as aforesaid.

And, fourteenth. Your orators further show that notwithstanding the State of Minnesota, by the aforesaid acts of her chief executive, had failed to keep, and had broken, as aforesaid, the contract entered into by her with the said company; and the said company, up to and after that time, had, in all things, kept and performed the said contract, and all and singular the obligations and duties by it to be done and performed under said contract, and the said State then and ever after-

wards having and holding the said twenty-five thousand dollars of the bonds of the said company, in exchange for which said State had not and never did deliver to said company a corresponding amount of State bonds aforesaid; yet the governor of said State, on the first day of December, eighteen hundred and fifty-nine, addressed and caused to be duly delivered to your orators and said William H. Welch, and each of them, a letter, of which the following is a copy, to wit:

STATE OF MINNESOTA, EXECUTIVE OFFICE,
"*St. Paul, Dec. 1st*, 1859.

"Messrs. ELON FARNSWORTH, EDWARD P. COWLES, and WM. H. WELCH, *Trustees of the Minnesota & Pacific Railroad Company:*

"GENTLEMEN: I have been officially informed by the State treasurer that no provision has been made by the company of which you are the trustees to pay the interest on the State railroad-bonds delivered
121 by me to that company in accordance with law, which interest is due this day upon said bonds. Default having been made in such payment, I hereby, on the part of the State of Minnesota, request and require you to make a foreclosure of the mortgage or trust-deed of the said company made to secure their first-mortgage bonds, which have been deposited with the treasurer of the State in return for the State bonds issued to that company, at as early a period as the terms of said mortgage or trust-deed will permit.

"I also request that you will reply to this official communication without unnecessary delay and state the course you intend to pursue in the premises.

"Very respectfully, your ob't servant,

[L. S.] "HENRY H. SIBLEY.

"By the governor:

"FRANCIS BAUSEN,
"*Secretary of State.*"

And in reply to the said letter the following letters and communications were written by your orators and said Welch to each other, and to the said governor, and were all soon after the respective dates thereof and prior to the 29th day of December, 1859, duly delivered to and received by said governor, and recorded in the executive journal of said State, where they still remain of record:

"NEW YORK, *Dec. 14th*, 1859.

"Governor SIBLEY:

"DEAR SIR: Your letter of the 1st instant, bearing date at St. Paul, and addressed to myself, as one of the trustees of the M. & P. R. R. Co., advising the trustees that default had been made in the payment of the interest upon the State bonds delivered to that R. R. Co., which matured on the day your letter bears date, was received by me on the 10th inst.

"Under the date of the 12th inst., I have written Mr. Farnsworth, one of my cotrustees, whose residence is Detroit, and he will communicate with Judge Welch, the third trustee, as well as with yourself.

"The trustees will, of course, discharge their duties in the premises. Their wide separation requires a little time for communication, inter sesse, as well as with yourself.

"With great respect, yours, truly,

"EDWARD P. COWLES."

122 "DETROIT, *Dec.* 19, 1859.

"MY DEAR SIR: Your favor, dated Dec. 1, was received on the 9th inst. I immediately wrote to Judge Cowles, requesting his views of our duties under the trust-deed. I have just received his reply, which I enclose to you. I have given the subject such reflection as the time has permitted, and think he is right, though the matter is not free from doubt.

"At all events, in a proceeding of such importance as the transfer of these important interests, it is of the greatest consequence that the proceedings should be such as to leave no doubt of their correctness or validity.

"I concur entirely with Judge Cowles, that we should act in this business in concurrence with the authorities of the State, and for the best interest of the trust-fund. I send those papers to you, as a considerable delay would occur in sending them first to Judge Welch. I request you to transmit them to him, and would like to hear from him his views on the subject.

"With great respect, your friend and obedient servant,

"E. FARNSWORTH.

"Hon. H. H. SIBLEY,
"*Governor of Minnesota, St. Paul.*"

The following is the letter of your orator "Judge Cowles," referred to in the foregoing:

"NEW YORK, *Dec. 12th*, 1859.

"Hon. E. FARNSWORTH:

"MY DEAR SIR: I have yours of the 9th instant, and by the same mail I also received from Gov. Sibley, of Minnesota, a letter bearing date the first instant.

"The governor states that the interest upon the State bonds issued to the M. & P. R. R. Co., which fell due the 1st Dec. instant, is not paid or provided for by the R. R. Co., and requires Judge Welch, yourself, and myself, as trustees of the M. & P. R. R. Co., to proceed to foreclose under our trust-deed.

"Now the original trust-deed provides for a foreclosure in case the interest upon the bonds of the railroad company remains at any time unpaid for six months after it shall have matured, and $250,000 in amount of the holders of such bonds require it—(foreclosure.)

123 "By the supplemental deed, there appears a recital that the M. &. P. R. R. Co. intend to deliver to the State of Minnesota certain of its (the railroad company's) first-mortgage bonds, and are to receive in return an equal and corresponding number and amount of the bonds of the State. Then follows a recital of the intention of securing the punctual payment of the interest of the bonds held by the State, which is followed by an authority given to the trustees in case of default in the payment of such interest, upon the request of the governor to go on and sell and foreclose, &c., &c., and this foreclosure and sale is to take place within sixty days after default, &c., &c.

"Now the way I construe all this is as follows: The interest upon the bonds of the M. & P. R. R. Co. matures semi-annually, upon the 1st August and 1st February.

"The State holds some of these bonds, for which they have issued to the railroad company an equal amount of State bonds.

"The interest upon the State bonds matures, as it would seem, on the 1st December and 1st June each year.

"With the interest upon those State bonds, as such, we, as trustees,

have nothing to do; nor can we foreclose, under our trust-deed, to pay the interest upon the State bonds.

"What the governor of Minnesota can do under that supplemental trust-deed is this:

"If the State of Minnesota are holders—as no doubt they are—of some of the bonds of the M. & P. R. R. Co., on which there is any unpaid interest due, the governor can give the trustees notice that the State holds such bonds; that they were given in exchange for a corresponding amount of the bonds of the State issued to that railroad company; that the interest upon the railroad company's bonds, so held by the State, specifying them by their respective numbers, which falls due at such and such time, is due and unpaid, and that the trustees are required to foreclose and sell under their trust-deed, in order to pay the interest on their railroad (not State) bonds; and under such notice the trustees would have only to proceed and sell.

"This it seems to me is the only proper course to pursue, and is the true construction of the two deeds.

"I wish to make one further suggestion. It is a matter of some doubt whether that supplemental deed can be made to control holders
124 of the railroad-bonds other than the State of Minnesota. That is, whether the holders of the railroad-bonds could be compelled to submit to a foreclosure when the interest had not been in arrear for more than six months. Now the interest on the bonds which the State hold matured, as I understand, on the first August last. If unpaid the interest will, on the first February next, have been in arrear and unpaid for six months. Whenever such shall be the case, holders to $250,000 in amount can, by the terms of the original trust-deed, require the trustees to foreclose and sell.

"On the second February next the State of Minnesota can join in such request, or if she alone has $250,000 in amount of the bonds of the Minnesota and Pacific Railroad, she can alone make a requisition upon the trustees that they sell.

"Now, to avoid litigation and difficulty, had we not better make to the governor of Minnesota the above suggestion, and see whether he will not agree with us in this view? A sale so made would be beyond question valid. One made under the supplemental deed would be of very doubtful authority in my judgment.

"I wish, as I know you and Judge Welch do also, to discharge these trust duties properly and correctly. If the view I have taken of this matter conforms to your own, will you please add to my letter such suggestions as you deem proper and forward it to Judge Welch, that he may peruse it and show it to the governor, or, if you think better, forward direct to the governor himself?

"We should act in harmony, as far as possible, with the views of the governor. But it is very clear, I think, whether we proceed under the six months or sixty days' view of the case, that the governor should give us notice that the State are the holders of such and such bonds of the Minnesota and Pacific Railroad Company. That the interest upon such bonds which matured on such a day remains unpaid.

"That these bonds are held by the State for a corresponding number and amount of bonds of the State of Minnesota issued to such railroad company, and that the trustees are required to proceed to foreclose and sell to satisfy those bonds of the railroad company, or the interest due thereon.

"Please let me hear from you soon.

"Very truly, yours, &c.,

"EDWARD P. COWLES."

125 "RED WING, *December 27th*, 1859.

"His Ex. H. H. SIBLEY,
"*Gov. Minnesota:*

"SIR: Not feeling at liberty to express an opinion as to the course to be taken by the trustees of the Minnesota and Pacific Railroad without consultation with my colleagues, I have delayed acknowledging the receipt of your official communication of the first inst.

"On yesterday I received the letter of Judge Cowles, which you were kind enough to send me. At this time I deem it unnecessary to say more than that I fully concur with Judge Cowles as to the propriety of proceeding to foreclose for the default of the railroad company at this time.

"I am, your ob't servant,

"W. H. WELCH."

The demand contained in the foregoing letter of the governor of Minnesota, bearing date the 1st Dec., 1859, was the sole and only demand made upon said trustees by or on behalf of the State of Minnesota to take any steps for a foreclosure under this trust, except one made previously to that of December 1st, aforesaid, which other demand was made by the governor aforesaid, and was by him in writing withdrawn.

No reply to the above and foregoing correspondence of said Farnsworth, Welch, and Cowles with the governor, in reply to his letter of Dec. 1, 1859, aforesaid, was ever made by said governor or by any one on his behalf, or on behalf of said State to said trustees, or any or either of them; and the sale or pretended sale made by said governor on the 23d day of June, 1860, as hereinafter stated, was made by said governor without any demand upon or notice to said trustees, or any or either of them, other than that contained in the aforesaid letter of Gov. Sibley of Dec. 1, 1859.

126 And, fifteenth. On the thirteenth day of January, A. D. 1860, the legislature of Minnesota, adopted a joint resolution, approved by the governor, in the words following, viz:

"NUMBER 4.

"JOINT RESOLUTION in relation to the destruction of certain blank railroad-bonds:

"Resolved by the legislature of the State of Minnesota, That the governor be, and he is hereby, directed to cancel and destroy the blank and unissued Minnesota State railroad-bonds delivered to him by Governor Sibley, and that a committee of three on the part of the senate, and a committee of four on the part of the house, be directed to be present on the occasion.

"AMOS COGGSWELL,
"*Speaker of the House of Representatives.*
"IGNATIUS DONNELLY,
"*President of the Senate.*

"Approved January thirteenth, one thousand eight hundred and sixty.

"ALEX. RAMSEY."

(Which joint resolution is published in the general laws of Minnesota for 1860, on page 303.)

The object and purpose, as well also as the effect of this act, was to

put it out of the power of the executive or other officer or agent of said State to deliver to the Minnesota & Pacific Railroad Company and to other railroad companies of said State, any of the bonds of said State as provided for under the State constitutional provisions as aforesaid, by the destruction of all engraved bonds in blank for that purpose which were then in existence, which said blank engraved bonds had been procured at the sole joint expense of said railroad companies, and at large expense.

And immediately after the passage thereof the said blank bonds were totally destroyed by said governor, pursuant to said joint resolution, by burning the same.

And your orators aver and charge that at the time of the passage of said resolution and the destruction of said bonds, the said Minnesota & Pacific Railroad Company had fully performed all its said obliga-
127 tions and duties to said State, and the governor thereof, and was not in default in the payment of any interest due said State upon the bonds of said company held by her, and the said company had fully exonerated the State treasury from liability on account of interest then due upon the State bonds delivered to said company, and was in nowise in arrear to said State therefor, nor in arrear for non-payment of any interest on its first-mortgage bonds held by said State.

And your orators further show that, by reason of the said failure and refusal of the State of Minnesota, by her chief executive, as aforesaid, to keep and perform the obligations of the contract made by said constitutional amendment, as aforesaid, and the persistent hostility of said executive to said company, and the manifest intention of the State to repudiate her obligations under said contract, as shown by the passage of said joint resolutions, and other acts and doings of said State and the people thereof, and for no other reason or cause, the said State bonds which had been delivered to said company became and were wholly discredited in the money-markets of the country and among all capitalists, and the same were wholly unavailable in the hands of said company and its contractors as a means of raising money wherewith to proceed with work on said roads or pay the interest upon its bonds, and thereby the said State bonds in the hands of said company failed to be, and were not within the intent and meaning of the said constitution, a loan of "the credit of the State," or of her aid to said company, as aforesaid, and thus the consideration of the said contract between said company and said State failed through the wrongful acts of the State aforesaid, and by reason of all the said wrongful acts, demands, refusals, and other unlawful and unconstitutional proceedings, the said
128 company was unable to pay the installments of interest upon its bonds delivered to the State as aforesaid, which became due on the first day of February, eighteen hundred and sixty, amounting to only the sum of twenty-one thousand dollars, the said State, however, still holding the said $25,000 of the bonds of the company, for which no State bonds were delivered to it in exchange as aforesaid; and neither the said State or any officer thereof had then been called upon to pay any interest or money on account of the said loan to said company.

But your orators further show that it was the belief of said company, its officers and managers, that said company would be able in a short time to recover from its financial embarrassment, and pay such interest and discharge all its obligations as it had up to that time done. And your orators believe, and so aver and charge the fact to be, that, but for the said wrongful and illegal acts of the said State and its officers,

the said company never would have failed or been behind time in the discharge of any of its obligations, and that, but for the wrongful and unlawful and unconstitutional acts and proceedings hereinafter set forth, said company would have speedily recovered from its financial embarrassments and difficulties so, as aforesaid, produced solely by the wrongful acts on the part of said State, and would have met and discharged all its obligations, and constructed and completed said roads, as required by its act of incorporation and said constitution.

And, sixteenth. Your orators further show that, notwithstanding the said State of Minnesota, by the aforesaid action of her executive officers and legislature, had broken the contract made by her with said
129 company as aforesaid, and said company had in all things faithfully performed all its obligations to the State, until hindered and delayed in manner aforesaid by said acts of the State, and the consequent discredit of the said bonds of said State, the legislature, further pursuing said intent to repudiate the said constitutional contract and impair the obligations thereof, on the part of the State, passed the following act, (which is published in General Laws of Minnesota for 1860, page 269,) to wit:

"AN ACT in addition to 'An act concerning land-grant railroads," passed August 12, 1858.

"Be it enacted by the Legislature of the State of Minnesota:

"SECTION 1. Default having been made in the payment of interest on the bonds issued by the land-grant railroad companies to, and held by the State, and the trustees under the deed or deeds of trust given to secure such bonds having neglected to foreclose the same, according to the provisions of such deed or deeds of trust, it is hereby made the duty of the governor to forclose the same, or to cause the same to be foreclosed, in conformity with the provisions of such deed or deeds of trust, and in accordance with law, if in his opinion the public interest requires it.

"SEC. 2. Upon a sale of the property, rights, and franchise, covered and embraced in such deed or deeds of trust, under such foreclosure hereinbefore mentioned, the governor is hereby authorized and empowered, in his discretion, to bid off and purchase the same for and in the name of the State, and to make or cause to be made to the State of Minnesota such suitable and proper conveyances as may be necessary.

"SEC. 3. This act shall take effect and be in force from and after its passage.

"Approved March 6th, 1860."

But no appropriation was ever made, by law or otherwise, to pay such amount as the said governor might choose to bid for the said property, rights, and franchises under said 2d section of the last above-cited act; and in fact no payment was ever made therefor to any one. No notice of the passage of said last-cited act was ever given to the said trustees.

130 And afterwards, on the tenth day of said month of March, 1860, the said legislature, further pursuing said intent to repudiate the contract made by said constitutional amendment, and totally impair the obligation thereof, passed the following concurrent resolution:

"NUMBER 1.

"CONCURRENT RESOLUTION of both houses of the legislature of the State of Minnesota, proposing amendments to the constitution of the State.

"Resolved by the house of representatives of the State of Minnesota, (the senate concurring,) That there be, and hereby are, proposed for the approval or rejection of the people the following amendments to the constitution of the State, viz:

"That section two (2) of article nine (9) of the constitution be amended so as to read as follows:

"SEC. 2. The legislature shall provide for an annual tax sufficient to defray the estimated ordinary expenses of the State for each year, and whenever it shall happen that such ordinary expenses of the State shall exceed the income of the State for such year, the legislature shall provide for levying a tax for the ensuing year sufficient, with other sources of income, to pay the deficiency of the preceding year, together with the estimated expenses of such ensuing year. But no law levying a tax or making other provisions for the payment of interest or principal of the bonds denominated 'Minnesota State railroad-bonds,' shall take effect or be in force until such law shall have been submitted to a vote of the people of the State and adopted by a majority of the *the* electors of the State voting upon the same.

"That section ten (10) of article nine (9) of the constitution be amended so as to read as follows:

"SEC. 10. The credit of the State shall never be given or loaned in aid of any individual, association, or corporation, nor shall there be any further issue of bonds denominated Minnesota State railroad-bonds, under what purports to be an amendment to section ten, (10,) article nine (9) of the constitution adopted April 15, eighteen hundred and fifty-eight, which is hereby expunged from the constitution, saving and excepting and reserving to the State, nevertheless, all rights,
131 remedies, and forfeitures accruing under said amendment.

"AMOS COGGSWELL,
"*Speaker of the House of Representatives.*
"IGNATIUS DONELLY,
"*President of the Senate.*

"Approved March tenth, one thousand eight hundred and sixty.
"ALEX. RAMSEY."

And afterwards, on the sixth day of November, eighteen hundred and sixty, the said expunging amendment of the constitution was ratified and adopted by the legal voters of said State, by a nearly unanimous vote, (which said concurrent resolution and amendment is published in the general laws of Minnesota for the year 1860, on page 297.)

And your orators aver and charge that the aforesaid concurrent resolutions of the legislature of Minnesota, and so-called amendment of the constitution of said State, were a repudiation, and violation, and breach of the contract made and entered into with said company by said amendment of April fifteenth, eighteen hundred and fifty-eight, and the same were intended to be, and were, an impairing of the obligations of such contract on the part of said State, and so were and are repugnant to the tenth section of the first article of the Constitution of the United States, and altogether null and void.

And, seventeenth, your orators further show that on or about the twenty-fourth of April, eighteen hundred and sixty, Alexander Ramsey, the then gove'nor of the State of Minnesota, wrongfully, and
132 without authority of law or notice to your orators or said Welch, or either of them, issued and caused to be published once in each week from that time until the twenty-third day of June following, in a newspaper published in the city of New York, and also in a newspaper published in the city of St. Paul, a notice, of which the following is a copy, to wit:

"*Foreclosure sale of the lands, properties, and franchises of the Minnesota and Pacific Railroad Company.*

"Whereas the Minnesota and Pacific Railroad Company, a corporation organized under the laws of the State of Minnesota, did, on the 31st of July, A. D. 1858, at the city of New York, and State of New York, execute, under its corporate seal, and deliver to Elon Farnsworth, Edward P. Cowles, and William H. Welch, in trust for the holders of the first-mortgage bonds to be issued by the said company, a certain indenture and trust-deed, whereby the said Minnesota and Pacific Railroad Company granted, transferred, conveyed, and assigned unto said Elon Farnsworth, Edward P. Cowles, and William H. Welch, as joint tenants, and not as tenants in common, and to their survivors and successors in the trust therein expressed, the entire railroad of said company, from Stillwater, in the State of Minnesota, via St. Paul and St. Anthony, via Minneapolis, to the town of Breckenbridge, on the Sioux Wood River, with a branch from St. Anthony, via Anoka and St. Cloud and Crow Wing, to St. Vincent, near the mouth of the Pembina River; also all the railways, rails, bridges, fences, ties, spikes, culverts, right of way, station-houses, and other buildings, and such lands as are selected or actually in use for depot or station grounds, then held or owned, or which might thereafter be held or owned, by said company for the purpose of constructing, operating, and maintaining its said railroad, or the accommodation of the business thereof, and all the tolls, incomes, rents, issues, profits, and alienable franchises of said company connected with said railroad, or relating thereto; all locomotives and stationary engines, tenders, and cars of every kind, machinery, machine-
shops, tools, implements, and materials connected with or in-
133 tended for the construction, equipment, operating, and conducting of said railroad and branch then owned or thereafter to be acquired by said company, all of which were in said deed declared to be appurtenances and fixtures of said road, for the purpose of securing the payment of the first-mortgage bonds of said company from time to time to be issued to the aggregate amount of twenty-three millions of dollars, but not exceeding thirty-five thousand dollars for each mile of road; said first-mortage bonds to be payable to the holders thereof on the first day of August, A. D. 1883, with interest at the rate of 7 per cent. per annum, payable in the city of New York, semi-annually, on the first days of February and August in each year; and whereas six hundred of said first-mortgage bonds, in denominations of one thousand dollars each, were delivered to and are held by the State of Minnesota as security for the payment of the principal and interest of an equal amount of the bonds of the State of Minnesota issued and delivered to said company, payable at the same time, with interest at the rate of 7 per cent. per annum, payable semi-annually, on the first days of December and June in each and every year.

"And whereas the said Minnesota and Pacific Railroad Company, on the twenty-seventh day of November, A. D. 1858, executed under their corporate seal, and delivered to said Elon Farnsworth, Edward P. Cowles, and William H. Welch, in trust for said mortgage bondholders, a supplement to said trust-deed, wherein it was recited, that whereas a portion of the bonds of said company were to be delivered to the State of Minnesota, and whereas the said trustees were authorized and empowered by said trust-deed, in case of default in the payment of the principal or interest of said first-mortgage bonds therein mentioned, to make sale of all or any of the property therein conveyed, in the manner therein specified, and whereas, in and by said supplement, the said trustees, their survivors or successors in the trust thereby created, were authorized and directed, in case of a default in the payment of the interest or principal part of said first-mortgage bonds, upon the demand and request of the governor of the State of Minnesota, as the agent of said State, to foreclose such trust-deed and take possession of all and singular the premises conveyed and transferred by said trust-deed, and upon such demand and request to sell such premises and property, or so much
134 thereof as the said governor might direct, pursuant to the terms and provisions of said trust-deed, by giving public notice of such sale by advertisement in one daily newspaper printed and published in the city of New York, and in one daily newspaper printed and published in the city of St. Paul, for six weeks successively, and in case of failure or refusal of said trustees, or the survivor or survivors of them, to comply with the demand and request of the said governor to make such foreclosure and sale as aforesaid, then the governor of said State was thereby authorized and empowered to make, or cause to be made, such foreclosure and sale as aforesaid, and in case of such foreclosure and sale by the governor, he was thereby authorized and empowered, for and in the name of the said Minnesota and Pacific Railroad Company, to make, or cause to be made, good and sufficient deeds of conveyance or other necessary instruments of transfer of the roads, lands, franchises, and other property of said company; and whereas the interest on the said bonds of said State issued to said companies became payable on the first day of December, A. D. 1859, and the said company having made default in the payment thereof, the governor of said State did, on the fifth of December aforesaid, as required by law, demand and request each of said trustees, in writing, to foreclose said trust-deed and to sell the property and franchises therein conveyed, pursuant to the terms of said trust-deed; and whereas said Minnesota and Pacific Railroad Company have made default in the payment of the interest accruing upon such first-mortgage bonds held by said State, and becoming payable on the first day of August, A. D. 1'59; and whereas the sum of twenty-one thousand dollars is still due to said State and unpaid thereon; and whereas said trustees have utterly neglected and still do neglect to proceed to the foreclosure of said trust-deed and the sale of the property and franchises therein conveyed:

"Now, therefore, notice is hereby given that, pursuant to the power vested in me in and by said trust-deed and the supplement thereto, and by virtue of the power conferred upon me by law, I, as governor and agent of the State of Minnesota, will sell, or cause to be sold, at public auction, at the capitol, at the city of St. Paul, in the State of Minnesota, on the 23d day of June next, at ten o'clock in the forenoon of that day, all the properties, rights, privileges, and franchises herein-

135 before enumerated, and described, and conveyed in and by said trust-deed."

"Dated at the executive office in St. Paul the 24th day of April, A. D. 1860.

"ALEXANDER RAMSEY,
Governor.

"GORDON E. COLE,
"*Attorney-General of Minnesota.*"

And your orators say that at the time of the publication of said notice, and at the time of the so-called sale therein advertised and made on the said 23d day of June, 1860, no notice of any failure or default of said company, save and except the notices hereinbefore set forth, nor any request that the said trustees should make any sale or foreclosure, nor any notice or information of the passage of said act of March 6th, 1860, directing such sale, was ever given or made to or upon your orators and the said Welch, trustees as aforesaid, or either of them; and your orators aver that it is untrue that the said trustees had refused, or that they were unwilling to comply with any legal demand to foreclose under their said trust-deed.

That on or about the nineteenth day of June, eighteen hundred and sixty, the said James M. Winslow, to whom thirteen of said first-mortgage bonds of said company had been delivered in payment and consideration of a conveyance of land to said company as hereinbefore set forth, and who then still retained and owned a portion of the same bonds, commenced his suit in equity in the district court for the second judicial district, county of Ramsey, and State of Minnesota, a court of general jurisdiction in common law and equity, against the said Minnesota and Pacific Railroad Company, your orators, and said Welch, trustees as aforesaid, and against the said governor, Alexander Ramsey, and filed his complaint therein, in which, among other things, he set up the said trust-deed of July 31st, 1858, a copy of which was an-
136 nexed to and made part of his said complaint; his ownership of said bonds; the execution and delivery of said supplement to said trust-deed, bearing date the 27th day of November, 1858, a copy of which was annexed to and made part of his said complaint; and the said notice and threatened sale by said Alexander Ramsay, governor as aforesaid, and prayed, among other things, that the said Ramsay might be restrained by the writ of injunction of the said court from making such sale, and that the said supplement to said deed of trust might be declared and adjudged null and void. And thereupon, according to the prayer of such complaint, a preliminary injunction, restraining and enjoining said defendant, Ramsay, from making such sale as aforesaid, was duly issued out of and under the seal of said court, according to the law and practice thereof, and said writ of injunction and the summons in said action were each duly and personally served upon the said defendant, Ramsey, on the twentieth day of said month of June, 1860, and were so served upon Gordon E. Cole, esq., the attorney-general of the said State, on the twenty-second day of said month; yet, notwithstanding the same, and in violation of such writ, and contempt of said court, he, the said Ramsey, proceeded, on the day named for that purpose in said notice, to wit, at twenty minutes past ten o'clock in the forenoon of that day, by one Benjamin W. Bronson, an auctioneer by him employed for that purpose, to offer for sale all the properties, rights, privileges, and franchises enumerated and described in his said notice of fore-

closure sale, altogether at once, as one parcel or item, and not separately.

And at the time aforesaid, after the reading by said Bronson of
137 said notice of foreclosure sale, and before any bid was made for such property, &c., the said writ of injunction was then and there in the presence of said governor and of said attorney-general, and all the bystanders, duly and publicly served upon the said auctioneer, Benjamin W. Bronson, by a duly appointed deputy sheriff of said county, yet the said Ramsey there and then ordered the said Bronson to proceed with such sale, and then, to wit, at thirty-four minutes past ten o'clock aforesaid, the said Ramsey bid one thousand dollars for all the said lands, properties, rights, franchises, and privileges of said company; saying that he did it as governor in behalf of the State of Minnesota. And no other bid being immediately offered, at thirty-six minutes past ten o'clock aforesaid, the said auctioneer struck off the whole properties, rights, privileges, and franchises enumerated and described in said notice, altogether at once as one parcel, and not separately, to the State of Minnesota.

And thereupon the following affidavits and deeds were made and executed, to wit, as follows:

"STATE OF MINNESOTA,
"*County of Ramsey, ss:*

"B. W. Bronson, of the county aforesaid, being duly sworn, deposes and says that he is an auctioneer, duly licensed pursuant to law, within and for the said county of Ramsey; that on the twenty-third day of June, A. D. 1860, between the hours of ten and eleven o'clock in the forenoon of that day, he did, pursuant to the annexed notice, and by the direction of the governor of the State of Minnesota, sell at public auction, at the capitol, in the city of St. Paul, in said county of Ramsey, all the railroad of the Minnesota and Pacific Railroad Company, and all the properties, lands, franchises, rights, and privileges of said company, conveyed and enumerated in the trust-deed described in the notice annexed, for a more accurate and detailed statement of which reference to said notice may be had, together with all the right, title, and
138 interest which the said Minnesota and Pacific Railroad Company had on the 31st day of July, A. D. 1858, or which they have since that time, or may hereafter acquire or become entitled to, in and to all those sections, or parts of sections, granted to the late Territory of Minnesota, by the act of Congress of the United States of America, approved on the 3d day of March, A. D. 1857, and which were subsequently granted to the said Minnesota and Pacific Railroad Company, by an act of the legislature of the late Territory of Minnesota, approved on the 22d day of May, A. D. 1857, for a further and more particular description of which reference is made to the trust-deed of the said Minnesota and Pacific Railroad Company, on file in the office of the secretary of state of the State of Minnesota, to the State of Minnesota, for the sum of one thousand dollars, that being the highest price bid for the same, and the State of Minnesota aforesaid being the highest bidder therefor.

"B. W. BRONSON,
"*Auctioneer.*

"Subscribed and sworn to before me this twenty-third day of June, A. D. 1860.

[SEAL.] "S. S. EATON,
"*Notary Public.*"

"STATE OF MINNESOTA, EXECUTIVE OFFICE,
St. Paul, June 23, 1860.

"I, Alexander Ramsey, governor of Minnesota, do hereby certify that, on the 23d day of June, A. D. 1860, between the hours of ten and eleven o'clock on the forenoon of that day, at the capitol, in the city of St. Paul, county of Ramsey, and State aforesaid, pursuant to law and to the notice hereto annexed, I did, as governor of said State of Minnesota, cause all the rights, lands, properties, privileges, and franchises which the Minnesota and Pacific Railroad Company owned on the 31st day of July, A. D. 1858, together with all the right, title, and interest of said railroad company, which they then had or have since acquired, or may hereafter acquire, in and to all those sections, or parts of sections, granted to the late Territory of Minnesota, by an act of the Congress of the United States, approved on the third day of March, A. D.
139 1857, and subsequently granted to said Minnesota and Pacific Railroad Company by an act of the legislative assembly of the late Territory of Minnesota, approved on the twenty-second day of May, A. D. 1857, for a full and detailed account of all which property reference may be had to the trust-deed of said Minnesota and Pacific Railroad Company, on file in the office of the secretary of state of the State of Minnesota, to be sold at public auction by B. W. Bronson, esq., whose affidavit is hereto annexed, and did, by virtue of the power vested in me by law, bid, for and on behalf of said State, the sum of one thousand dollars for all the lands, rights, properties, and franchises conveyed by the trust-deed of said company hereinbefore mentioned; that sum being the highest bid therefor, said properties, lands, rights, and franchises were struck off to, and were purchased by, the State of Minnesota.

"And I do further certify that, prior to said sale, I caused a notice of the time and place and manner of such sale to be published daily for six consecutive weeks in one daily newspaper published in the city of New York, and in one daily newspaper published in the city of St. Paul, a copy of which notice is hereto annexed, all of which will more fully appear by the affidavits of the printers of the respective papers in which the same was published, which are hereto annexed.

"ALEX. RAMSEY.

"Filed in this office June 23, 1860.

"J. H. BAKER,
"*Secretary of State.*"

Deed from the Minnesota and Pacific Railroad Company to the State of Minnesota.

"This indenture, made this sixteenth day of October, in the year of our Lord one thousand eight hundred and sixty, between the Minnesota and Pacific Railroad Company, a corporation created by an act of the legislative assembly of the late Territory of Minnesota, party of the first part, and the State of Minnesota, party of the second part, witnesseth:

"That whereas said party of the first part did, on the thirty-first day of July, A. D. 1858, at the city of New York, and State of New York, execute under its corporate seal, and deliver unto Elon Farns-
140 worth, Edward P. Cowles, and William H. Welch, in trust for the holders of the first-mortgage bonds to be issued by said party of the first part, a certain indenture and trust-deed, whereby the said party of the first part granted, transferred, conveyed, and assigned

unto said Elon Farnsworth, Edward P. Cowles, and William H. Welch, as joint tenants, and not as tenants in common, and to their survivors and successors in the trust therein expressed, the entire railroad of said party of the first part, from Stillwater, in the State of Minnesota, via Saint Paul and Saint Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood River, with a branch from St. Anthony, via Anoka and Saint Cloud and Crow Wing, to Saint Vincent, near the mouth of the Pembina River; also, all the railways, rails, bridges, fences, ties, spikes, culverts, rights of way, station-houses, and other buildings, and such lands as are selected or actually in use for depot or station grounds then held or owned, or which might thereafter be held or owned by said party of the first part, for the purpose of constructing, operating, and maintaining its said railroad, or the accommodation of the business thereof; and all the tolls, incomes, rents, issues, profits, and alienable franchises of said party of the first part, connected with said railroad or relating thereto, all locomotives and stationary engines, tenders and cars of every kind, machinery, machine-shops, tools, implement and materials connected with, or intended for the construction, equipment, operating, and conducting of said railroad and branch then owned or thereafter to be acquired by said party of the first part, all of which were in said deed declared to be appurtenances and fixtures of said railroad, together with all the right, title, and interest which said party of the first part then had or might thereafter acquire or become entitled to, in or to all those sections or parts of sections of land granted to the late Territory of Minnesota, by act of Congress, approved on the third day of March, A. D. 1857, for the purpose of aiding in the construction of a railroad from Stillwater, by way of St. Paul and St. Anthony, via Minneapolis, to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch, via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the legislature of said Territory might determine, and which were subsequently granted to the said party of the first part by an act of the late
141 Territory of Minnesota, approved on the twenty-second day of May, A. D. 1857, for a more full and accurate description of all which property reference may be had to the trust-deed of said party of the first part, on file in the office of the secretary of state of the State of Minnesota, for the purpose of securing the payment of the first-mortgage bonds of said company, from time to time, to be issued to the amount of twenty-three millions of dollars, but not exceeding thirty-five thousand dollars for each mile of road. Said first-mortgage bonds to be paid to the holders thereof on the first day of August, A. D. 1883, with interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York, on the first days of February and August in each and every year;

"And whereas six hundred of said first-mortgage bonds, in denominations of one thousand dollars each, were delivered to and are held by the State of Minnesota, as security for the payment of an equal amount of bonds of the State of Minnesota, issued and delivered to said company, payable at the same time, with interest at the rate of seven per cent. per annum, payable semi-annually, on the 1st days of December and June of each and every year; and whereas the said party of the first part, on the 27th day of November, A. D. 1858, executed under its corporate seal, and delivered to said Elon Farnsworth, Edward P. Cowles, and William H. Welch, in trust for said first-mortgage bondholders, a supplement to said trust-deed, wherein it was recited, that whereas a portion of the bonds of said company were to be delivered to the State

of Minnesota; and whereas the said trustees were authorized and empowered by said trust-deed, in case of default in the payment of the principal or interest of said first-mortgage bonds, to make sale of all or any of the property therein conveyed, in the manner therein specified; and whereas, in and by said supplement, the said trustees, their survivors or successors, in the trust thereby created, were authorized and directed, in case of default in the payment of the interest or principal of said first-mortgage bonds, upon demand and request of the governor of the State of Minnesota, as the agent of said State, to foreclose said trust-deed and take possession of all and singular the premises conveyed and transferred by said trust-deed, and, upon such demand and request, to sell such premises and property, or so much thereof
142 as the said governor might direct, pursuant to the terms and provisions of said trust deed, by giving public notice of such sale, by advertisement in one daily newspaper printed and published in the city of New York, and in one daily newspaper printed and published in the city of St. Paul, for six weeks successively; and in case of the failure or refusal of said trustees, or the survivors or survivor of them, to comply with the demand and request of the said governor to make such foreclosure and sale as aforesaid, then the governor of said State was thereby authorized and empowered to make or cause to be made such foreclosure and sale in the manner aforesaid; and in case of foreclosure and sale by the governor, he was thereby authorized and empowered, for and in the name of the said Minnesota and Pacific Railroad Company, to make, or cause to be made, good and sufficient deeds of conveyance, or other necessary instruments of transfer, of the roads, lands, franchises, and other property of said company, including and embracing all the right and interest of said company in said premises, in law and equity;

"And whereas the interest on the bonds of said State issued to said company became due and payable on the first day of December, A. D. 1859, and the said company having made default in the payment thereof, the governor of said State did, on the fifth day of December aforesaid, as required by law, demand and request each of said trustees to foreclose said trust-deed, and to sell the property and franchises therein conveyed, pursuant to the terms of said trust-deed, the said Minnesota and Pacific Railroad Company having also made default in the payment of the interest accruing upon its first-mortgage bonds held by said State, and becoming due and payable on the first day of August, A. D. 1859; and whereas the sum of twenty-one thousand dollars became thereby due upon said first-mortgage bonds; and whereas said trustees utterly neglected and refused to proceed to foreclose said trust-deed and sell the property and franchises therein conveyed; and whereas, by an act of the legislature of the State of Minnesota, approved the sixth day of March, A. D. 1860, the governor of said State was authorized to foreclose said trust-deed, and, upon the sale of the property, rights, and franchises covered and embraced in said deed, to bid off and pur-
143 chase the same for and in the name of said State, and to make, or cause to be made, such suitable and proper conveyances as may be necessary; and whereas, pursuant to the provisions of said trust-deed, and as directed by law, the governor of said State did, upon default of said trustees as aforesaid, after a public notice published as directed in said trust-deed, cause said trust-deed to be foreclosed, and as governor and agent of said State of Minnesota, cause all the properties, rights, privileges, and franchises belonging to said company, and conveyed in and by said trust-deed, to be sold at public auction, at the

capitol, in the city of St. Paul, and State of Minnesota, between the hours of ten and eleven o'clock in the forenoon of the twenty-third day of June, A. D. 1860;

"And whereas, pursuant to the power vested in him by law, said governor did bid off and purchase said lands, roads, and franchises, for and in the name of the State of Minnesota, for the sum of one thousand dollars, said State being the highest bidder, and that being the highest price bidden therefor:

"Now, therefore, this indenture witnesseth, that the said party of the first part, in consideration of the premises and of the sum of one thousand dollars, paid by the party of the second part, the receipt whereof is hereby acknowledged, hath granted, conveyed, bargained, sold, transferred, and assigned, and by these presents does grant, convey, bargain, sell, transfer, and assign, unto the party of the second part, and its assigns, all the rights, lands, properties, privileges, and franchises described, enumerated, and conveyed in the trust-deed of said Minnesota and Pacific Railroad Company, and hereinbefore described, for a more particular description of which reference is made to the trust-deed of said company, on file in the office of the secretary of state of the State of Minnesota, together with all right and equity of redemption of said company in and to any of said property, either real or personal, to have and to hold to said party of the second part, and its assigns, forever.

"In witness whereof said party of the first part has set its seal and subscribed its name, by Alexander Ramsey, governor of Minnesota, its attorney-in-fact, by virtue of the authority vested in him, and by
144 the supplement to said trust-deed hereinbefore referred to, the day and year first above written.

"THE MINNESOTA AND PACIFIC RAILROAD COMPANY,
"By ALEX. RAMSEY, [SEAL.]
Its Attorney-in-fact.

"Executed and delivered in the presence of—
"G. E. COLE.
"S. P. JENNISON."

But your orators show that the corporate seal of the said company was not then, nor was it ever, set or affixed to such pretended conveyance of said Ramsey, and that the place on such instrument, where the word "seal" above appears, there is on the original only a scroll in writing, made by said Ramsey.

And your orators show unto your honors that neither at the time of said sale, or at any other time, was or has there been any consideration in money or otherwise advanced or paid by or on behalf of the said governor of Minnesota, or by or on behalf of said State, for and on account of such sale or purchase, or pretended sale. And at the time aforesaid, and ever since that time, the said State held and retained the said twenty-five thousand dollars of the bonds of said company, delivered as aforesaid in excess of the amount of State bonds delivered to it. And your orators further show that said State had not, at the time of such advertisement and sale, paid any interest or sum of money on or on account of the said State bonds delivered to said company, nor had there been any request or demand that she or any of her officers should do so. And the said company had then in fact fully and completely exonerated
145 the treasury of said State from advances of money for that purpose, and no such payment or advances have in fact ever been made by or on behalf of said State, or purchase last above described, or for or on

account of said pretended conveyance so made by said Ramsey to said State.

And your orators further show that, at the time of said advertisement and so-called sale by said governor, a large number of said bonds of said company had been by it issued and delivered to parties other than the said State, in payment for the construction of its roads, and for right of way, and land for its use, as hereinbefore stated, which bonds were then, and are still, outstanding, and unpaid. That the holders of said bonds had and have no other security therefor than the said deed of trust of July 31st, 1858. But the said State, in addition to the security of that deed, had also the exclusive lien and security of the said 240 sections of land, worth at that time, and which if offered for sale would have brought much more than, the sum claimed by said governor to be due from said company to the State; and also had the said $625,000 of said first-mortgage bonds of said company, which also were then worth, and might have been sold by said governor for, much more than the said sum claimed by him to be due the State. And before said sale, by said governor, the said company, and the said Winslow, one of the said bondholders of said company, duly demanded of the said governor that he should, before proceeding to sell the said property and assets in said trust-deed enumerated, (which were the only security, as aforesaid, of said bondholders) offer for sale the said 240 sections of land, upon which said State had such exclusive lien, and the said bonds held by the State, or so much thereof as might be necessary to satisfy his said claims in behalf of the State; but the said governor then and there refused so to offer for sale, or make any attempt to sell, said property and assets upon which said State had such exclusive lien.

146 And your orators here charge and insist, and submit to the court, that the sale so made or pretended to have been made, as hereinbefore set forth, of the assets, property, and franchises of the Minnesota and Pacific Railroad Company, on said 23d day of June, 1860, by said Governor Ramsey, was utterly null and void, and of no effect, and in no way in fact divested said company or your orators of any right, title, or interest held by said company or your orators in and to such assets, property, and franchises; and that neither the said Ramsey individually, nor as governor of the State of Minnesota, nor saidState of Minnesota, took any right, title, or interest in said assets, property, or franchises, or any of them, under and by virtue of such sale; and that such attempted sale was in derogation of section 10, article 1, of the Constitution of the United States.

And after said sale as aforesaid, to wit, on the twenty-seventh day of October, eighteen hundred and sixty, the said Winslow filed his supplemental complaint in his said suit, in which he set up the aforesaid facts and circumstances of said so-called sale, and prayed, in addition to the prayer of the said complaint originally filed therein, that said sale and proceedings might be declared and adjudged null and void, and so set aside.

And your orators and said Welch, trustees as aforesaid for said company, and all the holders of its said bonds, had appeared in said action before said sale, and caused such appearance to be entered of record therein by one William Hollinshead, their attorney, who was a duly-admitted and practicing attorney of said court.

147 And afterwards John B. Sanborn and Charles C. Lund, who were holders of one of the aforesaid series of bonds of said company, prayed to be allowed to come in and defend said suit, and that they might be made parties defendant therein. And by order of

said court, made on the first day of December, 1860, said Sanborn and Lund were so allowed to defend and were made parties defendant in said suit, and they filed their answer therein, and prayed that said sale and proceedings might be confirmed and adjudged valid.

And afterwards such proceedings were had that the said cause came on to be heard upon the pleadings and proofs therein, whereupon, on the fifth day of March, eighteen hundred and sixty-one, a decree was duly made and entered therein, of which the following is a copy:

"JAMES M. WINSLOW
against
"THE MINNESOTA & PACIFIC RAILROAD COMPANY, Elon Farnsworth, Edward P. Cowles and William H. Welch, Alexander Ramsey, and John B. Sanborn and Charles C. Lund, partners, as Sanborn & Lund. } Decree.

"This action being brought to hearing for further directions on the report of William A. Spencer, esq., referee appointed in said action to take the testimony and report the facts therein, and the said report, together with the pleadings, having been read, and George A. Nourse, as counsel for the plaintiff, and Henry J. Horn and James Gilfillan,
148 as counsel for the defendants, Sanborn and Lund, having been heard, and it appearing by the affidavit of George A. Nourse, attorney for the plaintiff, that more than twenty days have elapsed since the service of the summons in said action upon said defendant Ramsey, and since the appearance in said action of said defendants Farnsworth, Cowles and Welch, and also since the filing of the complaint and supplemental complaint in said action, and that no answer, nor copy of answer, nor demurrer, nor copy of demurrer in said action have been served on the attorney for the plaintiff on the part of said defendants Ramsey, Farnsworth, Cowles, or Welch, it is thereupon ordered, adjudged, and decreed, and this court, in virtue of the power therein vested, doth order, adjudge, and decree, that the supplement to the trust-deed mentioned and set forth in the complaint in this action, which supplement is also mentioned and set forth in said supplemental complaint, (being the same marked "Schedule B" therein,) be, and that the same is hereby, vacated, set aside, and declared void; also, that the sale mentioned and set forth in said supplemental complaint, of the property, lands, and franchises of said defendant, the Minnesota & Pacific Railroad Company, be, and the same is hereby, vacated and set aside, and declared to be void and of no effect.

"Saint Paul, March 5, 1861.

"E. C. PALMER,
Judge."

And said decree has never been vacated, set aside, reversed, or appealed from, but still remains of record in said court, and in full force and effect.

149 And the said supplement to the trust-deed mentioned in the complaint and supplemental complaint in said action, marked "Schedule B" therein, and referred to in said decree, and thereby vacated, set aside, and declared void, is the same instrument hereinbefore set forth of the date of November 27th, 1858. And the sale referred to in the foregoing decree, and therein and thereby vacated, and set aside, and declared to be void and of no effect, is the same sale by said Bron-

son, under the direction of said Ramsey, hereinbefore set forth, and which is described in and sought to be made effective by said deed of said Alex. Ramsey, dated the sixteenth day of October, 1860.

And your orators aver and charge that the said decree is a final and conclusive adjudication of and upon the matters therein passed upon, binding upon all the parties and their privies in said suit, including all of the defendants herein.

And eighteenth. On the eighth day of March, eighteen hundred and sixty-one, the legislature of said State passed an act, (which is published in the Laws of Minnesota, for 1861, on pages 235, &c.,) which act is as follows, to wit:

"AN ACT to facilitate the construction of the Minnesota and Pacific Railroad.

"Be it enacted by the legislature of the State of Minnesota:

"SECTION 1. That the road, lands, property, rights, franchises, privileges, and immunities belonging or appertaining to the Minnesota
150 and Pacific Railroad Company prior to the sale and purchase thereof by the governor, on the twenty-third day of June, one thousand eight hundred and sixty, on behalf of the State, and now claimed or held by the State, and all bonds and securities of the said company held by the State, shall be, and are hereby, released, discharged, and restored to the said company, free of all liens or claims thereon held by or on behalf of the State.

"SEC. 2. The provisions in this act contained are upon condition that said company shall commence the construction of that portion of said road and branch extending from St. Paul to St. Cloud and Sauk Rapids, on or before the first day of July next, and to put the same into operation, fully equipped for business, within eighteen months thereafter, and to construct and put into operation, and fully equip for business, those portions of the main line of said road extending from St. Anthony, via Minneapolis, westwardly to the west line of range thirty, and from Stillwater to St. Paul, within fifteen months from the expiration of the time last aforesaid, and thereafter to continue to construct and put into operation, and fully equip for business, the said road or branch at the rate of thirty miles annually, and all of said road and branch on or before the third day of March, one thousand eight hundred and seventy.

"SEC. 3. The said company shall, as a further consideration of this act, construct and put into operation, and fully equip for business, that portion of the main line extending from St. Paul to St. Anthony
151 on or before the first day of January next; in default of which all the rights and benefits conferred upon said company by virtue of this act shall be forfeited to the State absolutely, and without any further act or ceremony whatever; and, in case the said company shall fail to construct the other and further portions of said road and branch as aforesaid at the time or times aforesaid, the said company shall forfeit to the State absolutely, and without any further act or ceremony whatever, all the lands, property, and franchises pertaining to the unbuilt portions of said road and branch; and in either case, or in any forfeiture whatever, under the provisions of this act, the State shall hold and be possessed of all such lands, property, and franchises so forfeited, without merger or extinguishment, to be used, granted, or disposed of for the purpose of aiding and facilitating the construction of said road and branch.

SEC. 4. And be it further enacted, That, as a condition-precedent to the right of said company to the rights, privileges, franchises, road-beds, right of way, properties, and immunities hereinbefore granted and assigned, or restored, and before any right or title whatever thereto shall vest in said company, said company shall pay to the State treasury the amount of legal costs and expenses incurred by the State in the foreclosure and sale of the said Minnesota and Pacific Railroad, said expenses to be certified to by the governor, and shall be required, as a guaranty of their good faith, to deposit with the governor of Minnesota, on or before the first day of July, one thousand eight hun-
152 dred and sixty-one, ten thousand dollars in cash, or State or United States stocks, at their current value in New York City, which sum, so deposited, shall be absolutely forfeited to the State of Minnesota on failure of said company to construct said road from St. Paul to St. Anthony on or before the first day of January, one thousand eight hundred and sixty-two: Provided, That, upon the construction thereof, said company, so making such deposits, shall be, and are hereby, authorized to withdraw said sum of money or stocks so deposited as aforesaid.

"SEC. 5. This company shall have the power to enter upon and pass over the railroads of any other company whose railroad connects with that of this company with their cars and engines; and any other company whose railroad connects with that of this company shall have like power to enter upon the railroad and pass over the same with their cars and engines, and such reciprocal use of said respective roads shall be upon such terms and conditions as shall be agreed upon by the said respective companies, and in case the two companies cannot agree upon said terms and conditions, then either party may, upon ten days' notice, apply to the governor of the State, who shall appoint three competent and disinterested persons to determine said terms and conditions, whose decision shall be final and conclusive for the period of three years, when, and at the end of each three years then either company may require a new appointment of persons in the manner aforesaid, to readjust said terms and conditions.

"SEC. 6. That all persons, their heirs or legal representatives, who were entitled to the right of pre-emption, under the laws of the United States, to any of the lands granted to this State by the act of Congress of March 3, 1857, for railroad purposes, at the time when the line of said road was definitely fixed and located, and which, by this act, are restored to said company, and who have heretofore occupied the
153 same in good faith and shall have continued in the occupancy thereof at the time when the said company shall become entitled to the fee thereof, shall be at liberty to purchase the same of said company for the sum of one dollar and twenty-five cents per acre: Provided, that application therefor and proof of the right to purchase shall be made within six months after the fee of said lands shall be acquired by said company as aforesaid.

"SEC. 7. The stockholders of said company, may, by a vote of the majority thereof in interest, reduce the number of directors to seven, a majority of whom shall constitute a quorum.

"SEC. 8. This act shall take effect and be in force from and after its passage.

"Approved March 8, 1861."

And thereupon the said company accepted the said last-cited act and all its terms and conditions. And all the conditions specified and

required to be performed in and by section four of said last-cited act were at once duly and fully complied with and performed by the said company.

And your orators aver and charge that, by the passage and acceptance of said act as aforesaid, and the performance of said conditions precedent, all color and claim of title, on the part of said State, in or to the properties, rights, privileges, and franchises of said company, under or by virtue of the aforesaid pretended sale and purchase, were forever annulled and extinguished. And the said act and the acceptance thereof made and was a new contract between the said State and said company.

And nineteenth. Your orators further show that, upon the passage of said act, and encouraged thereby, the said company was enabled to and did, in fact, resume work upon said roads and entered into a contract with Valentine Winters, Jonathan Harshman, and Elias F. Drake
154 for the completion of that portion of its road from St. Paul to St. Anthony, on or before the first day of January then next, according to the requirements of section two of said last-cited act, and two locomotives and some passenger and freight cars were purchased, and about a quarter of a mile of the track of said road was laid and completed.

But among other terms and conditions of said contract with said Winters, Harshman and Drake, it was stipulated and agreed that the said company should pay the said contractors for said work in one hundred and twenty thousand dollars of mortgage-bonds upon said portion of its road, and seventy-six thousand eight hundred acres of the lands before conveyed to your orators and said Welch in trust as aforesaid.

And in order that the same might be taken by said contractors free and discharged from such trust and lien, and that the said one hundred and twenty thousand dollars of bonds to be paid to said contractors might take precedence of said bonds issued under and secured by said trust-deed, and be secured by a first and only lien upon that portion of said road, the said company undertook and promised the said contractors to procure through the action of your orators and said Welch, trustees as aforesaid, a foreclosure of the lien of said trust-deed, and the sale by said trustees and the purchase at such sale, by some one in the interest and acting for said company and under its direction, of all the property, rights, and franchises in said trust-deed enumerated, and the conveyance of the same by such purchaser to the seven persons who then were the directors of said company, who should then organize as a new company and issue said one hundred and twenty thousand dollars of bonds, and convey said lands to said contractors as
155 agreed as aforesaid. But your orators and said Welch refused to become parties to the consummation of such undertaking and agreement, and thereupon the said contractors refused to proceed further in the completion of said road, and threatened to take up and remove what iron had been laid, and to take away from the State that and other iron which had been procured and brought to Minnesota for laying said track to St. Anthony, together with the said locomotives and cars.

And thereupon, in or about the month of September, 1861, the said company made another agreement or arrangement with the aforesaid contractors to the effect that if they, the said contractors, would not remove said iron and locomotives, cars, &c., as aforesaid threatened, but allow the same to remain, the said company would, under the provisions and conditions of said section three of said act of March 8, 1861, default and forfeit to the State all its lands, property, rights, and fran-

chises, and would thereupon, through its influences aided by the said contractors, procure from the legislature of said State, at its next session, the passage of an act granting all the same property and franchises to the same persons who were then the president and directors of said company and its principal stockholders, or to persons in their interest and under their influence, which legislative act it was agreed should be substantially and in effect such an one as the act which was afterwards in fact passed on the 10th day of March, 1862, and is hereinafter set forth. And that after the passage of such act such grantees from the State should and would organize as a new company and enter into a new contract with the said Winters, Harshman and Drake in the same terms substantially as the one hereinbefore stated. And
156 for further assurance to said contractors, and with a view of bringing more influence to bear upon such legislature, the said company caused and procured a penal bond in a large sum of money, to wit, about twenty thousand dollars, to be prepared and executed by a large number of responsible and influential citizens of said State, the condition of which bond was to the effect that such legislative action as aforesaid should be procured and such new contract entered into with them, the said Winters, Harshman and Drake.

And twentieth. Afterwards, on the 10th day of March, eighteen hundred and sixty-two, the legislature of said State did pass the following act, to wit:

"An act to facilitate the construction of the Minnesota & Pacific Railroad, and to amend and continue the act of incorporation relating thereto.

"Be it enacted by the legislature of the State of Minnesota:

"SECTION 1. That all the rights, benefits, privileges, property, franchises, and interests of the Minnesota and Pacific Railroad Company, acquired by the State of Minnesota by virtue of any acts, deeds, agreement or thing by the said company heretofore done or suffered, or by virtue of any law of the State or the constitution thereof, or of the former Territory of Minnesota, or by reason of any sale of the same, or any part thereof, by the governor of the State, on the twenty-third day of June,
157 eighteen hundred and sixty, and bid in and purchased for the benefit of the State, be, and the same are hereby, granted and transferred to Dwight Woodbury, Henry T. Welles, R. R. Nelson, Edmund Rice, Edwin A. C. Hatch, James E. Thompson, Leander Gorton, Richard Chute, and Wm. Lee, their associates and successors, for the purpose and on the terms and conditions hereinafter in this act provided, free and clear of all claims or liens thereon, and from all liens and claims by or to the State of Minnesota, except as hereinafter provided.

All lands, property, franchises, &c., of M. & P. R. R. Co. acquired by the State to be transferred to D. Woodbury and others.

"SEC. 2. All the rights, privileges, franchises, lands, property, and interests, granted by the Territory of Minnesota to the Minnesota and Pacific Railroad Company, by the act of said Territory, approved May twenty-second, one thousand eight hundred and fifty-seven, entitled 'An act to execute the trust created by an act of Congress entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in

All rights, franchises, lands, &c., granted to M. & P. R. R. Co., by act of May 22, 1857, continued, granted to and vested in said Woodbury, his associates and successors, free of all liens or claims.

said State,"' approved March third, eighteen hundred and fifty-seven, are hereby continued and granted to and vested in the said Dwight Woodbury, Henry T. Welles, R. R. Nelson, Edmund Rice, Edwin A. C. Hatch, James E. Thompson, Leander Gorton, Richard Chute, and William Lee, and their associates and successors, with all the immunities, rights, property, benefits, and privileges which the said The
158 Minnesota and Pacific Railroad Company had, or might or could have, by reason of the passage of said act, free and clear of all claim and liens thereon, and free from all liens and claims of the State of Minnesota against the same, except such as are retained by the provisions of this act; and the said persons hereinbefore named, and their associates and successors, shall hereafter be known as the Saint Paul and Pacific Railroad Company, and by that name may sue and be sued, and have and exercise all the powers, rights, and privileges which heretofore pertained to the said The Minnesota and Pacific Railroad Company by the act hereinbefore referred to, or by any other act or law; and that the persons hereinbefore named shall be the directors of the said The Saint Paul and Pacific Railroad Company for one year, and until others are elected or appointed in their places.

Known as the St. Paul and Pacific R. R. Co.

Directors for one year.

"SEC. 3. The provisions in this act contained are upon condition that the said The Saint Paul and Pacific Railroad Company shall complete and put into operation, and fully equip for business, that portion of the main line of said road extending from Saint Paul to Saint Anthony, on or before the first day of September next, and that portion of the branch line of said road extending from Saint Anthony to Anoka, by the first day of January, eighteen hundred sixty-four, and to Saint Cloud by the first day of January, eighteen hundred and sixty-five, and those portions of the main line of said road extending from Stillwater to Saint Paul, and from Saint Anthony by way of Minneapolis westwardly to the west line of range thirty, within one year from the expiration of the time last aforesaid, and to Little Falls by the first day of January, eighteen hundred and sixty-six, and thereafter to continue to construct and put into operation, fully equipped for business, the said road or branch, at a rate of thirty
159 miles annually, and all of said road or branch on or before the third day of March, eighteen hundred and sixty-seven: Provided, That as evidence of the good faith and ability of said company to construct the portion of said road running between St. Anthony and Anoka within the time named herein, said company shall deposit with the governor of the State, on or before the first day of January, 1863, in money or bonds of the United States or of this State, or some State of the Union in good credit, the sum of ten thousand dollars, to remain in the hands of the governor until the first day of January, 1864, or until said road shall be completed to Anoka, as provided by this act; when such deposit shall be returned by the governor to said company, or to the party who shall have made such deposit, on surrender of the receipt given therefor; but if said road from Saint Anthony to Anoka shall not be completed and the cars running thereon by the time last named, said deposit shall become absolutely the property of the State, and shall be disposed of as the legislature shall direct.

Completion of road, when.

Deposit $10,000, when.

"SEC. 4. The board of directors of the Saint Paul & Pacific Railroad Company shall consist of seven persons, who shall be elected by the stockholders annually, four of whom, at least, shall be citizens of the United States, and any loyal citizen thereof

Board of directors consists of seven.

shall be eligible to the office of director, and a majority shall constitute a quorum; and meetings of said board may be held within or without the State: Provided, that in the election of directors and at all other elections or meetings of said company, a majority of votes shall govern.

One vote for each $100 paid on stock.

Each share of full-paid stock shall entitle the holder thereof to one vote, and upon any shares of stock not fully paid up the holder shall be entitled to one vote and no more for each hundred dollars actually paid, but no stock shall be voted upon upon which there shall be then due any unpaid installment by assessment.

"SEC. 5. In case the said The Saint Paul & Pacific Railroad Company shall fail to construct, put into operation, and fully equip for business, that portion of the road extending from Saint Paul to Saint Anthony on or before the first day of January next, all the rights, benefits, privileges, lands, property, and franchises conferred upon said company by virtue of this act, or any law of the State or Territory of Minnesota, heretofore passed, shall thereupon become forfeited to the State absolutely, without any judicial or legal proceedings, or any further act or ceremony whatever; and in case

Forfeiture for non-completion.

160 the said company shall fail to construct the other and further portions of said road and branch, as provided by this act, and at or within the time or times herein specified, or shall fail to make the deposit required to be made by the provision to section three of this act, by the time named therein, all the lands, property, privileges, rights, and franchises of the said company pertaining to the unbuilt portions of said road and branch shall thereupon become forfeited to the State absolutely, and without any further act or ceremony whatever, or any judicial or legal proceedings therefor, in which case the said State shall hold the same without merger or extinguishment, to be used, granted, and disposed of for the purpose of aiding in the construction of said road as aforesaid, and in either case, or in any forfeiture whatever under the provisions of this act, the State shall hold and be possessed of all such lands and property and franchises so forfeited, without merger or extinguishment, to be used, granted, or disposed of for the purpose of aiding and facilitating the construction of said road and branch.

SEC. 6. For the purpose of aiding in the construction of the Saint Paul and Pacific Railroad and the branch thereof, all the interest of the State, present and prospective, in and to any and all lands granted by Congress to the Ter'itory of Minnesota, for the purpose of aiding in the construction of a road from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of the (the Big) Sioux Wood River, with a branch via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North, agreeably to the terms of an act of Congress, which was approved March 3d, 1857, together with all and singular the rights, privileges, and immunities conferred and intending to be conferred by said act of Congress, are hereby granted to said Saint Paul and Pacific Railroad Company, conditioned that said land shall be applied to the construction and equipment of said road, and for no other purpose whatever. Whenever said company shall actually complete that portion of the road between Saint Paul and Saint Anthony, so that regular trains of cars are running thereon, and not before, the governor shall certify the same to the Sec-

Lands granted by act of Congress of March 3, 1857, for railroads hereby granted to St. P. & P. R. R. Co.

When title to shall vest.

retary of the Interior, and thereupon the title to one hundred and twenty sections of land shall vest in said company. And when twenty continuous miles of said road shall be

161 completed and regular trains running thereon, the title to a further quantity of one hundred and twenty sections of land shall

vest in said company. And whenever said company shall actually complete twenty continuous miles of said road from Minneapolis westwardly, so as to admit of the running of regular trains of cars on the same, the governor shall certify the same to the Secretary of the Interior, and thereupon a further quantity of one hundred and twenty sections of said lands shall vest in said company; and so on, as often as any further twenty continuous miles of said road shall be completed, so as to admit of the regular running of trains of cars thereon, the governor shall in like manner certify the same to the Secretary of the Interior, and a further quantity of one hundred and twenty sections of said land shall vest in said company; and it shall be the duty of the governor, whenever said road shall be completed between Saint Paul and Saint Anthony, in his official capacity and on behalf of the State, to convey to said company one hundred and twenty sections of land; and whenever any further twenty continuous miles of said road or its branches shall be completed and in operation, the governor shall in like manner convey a further quantity of one hundred and twenty sections of land, and so on, as often as any twenty continuous miles of said road or its branches shall be completed, shall in like manner convey to said company a further quantity of one hundred and twenty sections of land, until there shall be conveyed to said company all the lands to which they shall be entitled according to the terms and provisions aforesaid: Provided, That upon the written authority of said company, filed with the State treasurer, said lands, when the company is entitled thereto, may be conveyed by the State directly to the assigns of said company.

When governor to deed.

May be conveyed to assigns—when.

"SEC. 7. Section nineteen of chapter three of the act to which this act is amendatory is hereby amended, so far as it relates to the Saint Paul and Pacific Railroad Company, so as to read as follows:

Fences, road-crossings, cattle-guards.

"Whenever, after cars commence running on said road or branch, any owner or occupants of lands adjoining the same shall enclose his or her lands by constructing a fence on the line of said railroad, said company shall construct and maintain one-half of the same as a partition-fence, the other half to be erected and maintained by the owner or occupant of such adjoining land; and all fences erected on the line of said road, which may form part of any adjoining enclosure, shall be regarded as a partition-fence, subject to the laws now or hereafter in force regulating such fences between individuals.

162 Said company shall construct and maintain suitable cattle-guards at all public road-crossings, except street-crossings in towns and cities, and, at the request of the respective owners through whose lands the said road passes, shall make and maintain such reasonable farm-crossings as shall be necessary to accommodate said land-owners, and the said company shall be liable for all damages sustained by any person by reason of any neglect on the part of said company to comply with the provisions of this section, unless the same shall arise from the carelessness, negligence, or misconduct of the person, his agents or servants, who may suffer such damage.

Law may be modified after ten years.

"So much of section twenty-four, chapter one, and section nineteen of chapter three of the act, to which this act is amendatory, so far as they relate to the fencing and cattle-guards, affecting the said Saint Paul and Pacific Railroad Company, is hereby repealed. At any time after the expiration of ten years from and after the passage of this act the legislature shall have full power to alter, modify, or change the provisions of this section, to require the entire

construction and maintenance by the company of all such fences along the lines of their said road and branch, and prescribe such rules and regulations concerning the same as in their judgment shall seem best

"SEC. 8. That all persons, or their assigns or legal representatives, who, in good faith, settled upon any of the lands hereby granted to the said the Saint Paul and Pacific Railroad Company, at or prior to the time when the line of said road and branch was definitely fixed and located with a view to pre-empt, and who have continued to occupy the same, shall be at liberty to purchase such land at two dollars and fifty cents per acre, if within the six-mile limits of the line of said road; and if without such limits, at one dollar and twenty-five cents per acre: Provided, That application therefor and proof of the right to purchase shall be made within six months after the fee of said lands shall be acquired by said company.

Stock not to be issued nor mortgage or lien created to pay debts of M. & P. R. R. Co. for any purpose except construction of road.

"SEC. 9. It shall not be lawful for said company to issue capital stock or make any mortgage or lien on said road-bed, superstructure, rolling-stock, or other property connected with said road, or make any sale of, or create or give any lien or mortgage on any lands granted to construct
163 said road, for any debt, liability, or obligation of the Minnesota and Pacific Railroad Company, or for any debt, liability, or obligation hereafter to be incurred by the said Saint Paul and Pacific Railroad Company, except for the bona-fide purpose of constructing, completing, and equipping said road or branch, until after it shall have been completed for the running of cars thereon to a point opposite St. Cloud, in the said branch, and to the west side of range thirty-one, on the main line of said road: Provided, That no lien, mortgage, or other incumbrance shall be made on any of the uncompleted roads or lands, after the completion of the road to St. Cloud, except for the bona-fide purpose of constructing said uncompleted roads.

"SEC. 10. If, at any time on or before the first day of September next, said road between Saint Paul and Saint Anthony shall be completed for the running of cars thereon, it shall be the duty of the governor, at any time after such completion, as aforesaid, on the presentation and surrender of the receipt given therefor, to return to the holder of such receipt the bonds and scrip, with the accrued interest on the same, which were deposited with the governor in June, one thousand eight hundred and sixty-one, on behalf of the Minnesota and Pacific Railroad Company, under the provisions of the act approved March eighth, one thousand eight hundred and sixty-one.

"SEC. 11. The Saint Paul and Pacific Railroad Company shall transfer, by all regular trains, all passengers and freight delivered to the same by any connecting line of railroad now or hereafter to be built, in the same manner and at no greater rates than for the time being shall be charged by said Saint Paul and Pacific Railroad Company for the same service to persons living on the line of said road: Provided,
164 That any such connecting line shall be governed by the same rules in transporting passengers and freight over their said lines delivered to them by said Saint Paul and Pacific Railroad Company.

Executions issued on judgment against M. & P. R. R. Co. not to be levied on lands or property granted to St. P. & P. R. R. Co., unless specially directed by court.

"SEC. 12. That no execution issued or to be issued upon any judgment now or hereafter to be rendered against the Minnesota and Pacific Railroad Company, on any liability incurred prior to January 1st, 1862, shall be levied upon any of the lands, property, or franchises by this act granted to the said Saint Paul and Pacific Railroad Company, unless specially directed to make such levy by a decree or judgment

of the court; nor shall any injunction to stay or impede the construction of the railroad to be constructed or completed under the provisions of this act by said Saint Paul and Pacific Railroad Company be allowed or issued, except upon complaint filed and adequate security by injunction-bond given, nor until after the service of the notice of the application therefor upon the said company at least sixty days prior to the time of such application, which application must be heard at some general term of the court in the proper county. Such application shall be heard upon the complaint and answer, and determined thereon according to the practice and course of decisions in like cases.

Injunctions—how and when granted.

Applications for—how and when heard.

"SEC. 13. All acts and parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed. This act to take effect and be in force from and after its passage.

Act—when to take effect.

"Approved March 10th, 1862."

(Which said last-cited act is published in the laws of Minnesota for 1862, on page 247, &c.)

165 And your orators show to your honors that six of the persons who are in said act named as the grantees of the State of "all the rights, privileges, franchises, lands, property, and interests granted by the Territory of Minnesota to the Minnesota & Pacific Railroad Company by the act of said Territory approved May twenty-second, one thousand eight hundred and fifty-seven," (the same act hereinbefore set forth,) were the president, directors, and the controlling managers and the holders of a large and the controlling majority of the stock of and in the said Minnesota & Pacific Railroad Company, from the time of its organization up to and at the several times the said company made the aforesaid arrangements with the said Winters, Harshman and Drake, and when it made default and suffered forfeiture, as aforesaid, under said act of March, 1861.

And on the next day after the passage of said act of March, 1862, to wit, on the eleventh day of said month, the persons named in said act of March 10th, 1862, as grantees of the rights, franchises, &c., of said Minnesota & Pacific Railroad Company, met at St. Paul, in said State, and organized, under said act, as a board of directors of the St. Paul & Pacific Railroad Company by the election as president thereof of the same person who had been president of said Minnesota & Pacific Railroad Company from its organization to that time, and on the same day made and entered into a contract with said Winters, Harshman and Drake, in the terms and to the effect before promised by said Minnesota & Pacific Company, as hereinbefore stated.

And after that, the officers, directors, and stockholders of said Minnesota & Pacific Railroad Company ceased holding any meetings, or having any place of business, or doing any business as or in the name
166 of the Minnesota & Pacific Railroad Compan', and denied its longer existence.

And all the stockholders of and in the said Minnesota & Pacific Company, who were not named in said act of March 10th, 1862, as grantees, as aforesaid, had, without other consideration, full-paid stock voted and delivered to them in and by the said St. Paul & Pacific Company, equal in amount to the amount of their paid-up subscriptions to the stock of said Minnesota & Pacific Company, so that the stockholders in the St. Paul & Pacific Company became and were identically the same as the stockholders of the Minnesota & Pacific Company.

And at or about the same time the said St. Paul & Pacific Railroad Com-

pany made, executed, and delivered to said defendant, Walter L. Cutting, a trust-deed, purporting to be a first lien upon that portion of said road from St. Paul to St. Anthony, to secure the said one hundred and twenty thousand dollars of first-mortgage bonds so as aforesaid agreed to be paid to said Winters, Harshman and Drake, and afterwards said bonds were issued and paid to said Winters, Harshman & Drake, and are still outstanding.

And your orators further show that, at the time of the passage of the said several acts by the legislature of the State of Minnesota, the constitution of said State contained the following provision, to wit:

"ARTICLE X.

"SEC. 1. The term 'corporation,' as used in this article, shall be construed to include all associations and joint-stock companies having any of the powers and privileges not possessed by individuals or partnerships, except such as embrace banking business.

"SEC. 2. No corporations shall be formed under special acts except for municipal purposes."

167 And your orators aver and charge that it was not the intention of said legislature, by said special act of March 10th, 1862, or any other act, to violate the aforesaid State constitutional provision and restriction by forming a new corporation, but, on the contrary, the intention as well as the effect of such legislation by said act, and the true construction of the same, is to preserve and continue in existence, under a new name and some modification of its charter and change of corporators, the same body politic and corporate as had before existed under and by the name of the Minnesota & Pacific Railroad Company aforesaid, and liable for all its aforesaid debts.

And your orators further show that the said persons named as grantees in said act of 1862 are the very identical persons who, as officers, managers, and directors of the said Minnesota & Pacific Railroad Company, and controllers of its management and affairs, were then, as ever since its organization they had been, in the exclusive actual possession, occupancy, use, enjoyment, and control of all and singular the said lands, properties, rights, interest, and things, of every description, and the franchises, common seal, books, accounts, and records of the said Minnesota & Pacific Railroad Company, which said actual possession was never suspended or interrupted, and being so in possession and occupancy as aforesaid, upon the passage of said act of 1862, they continued in such possession; but they, their successors and assigns, thereupon, and founded upon, and claiming under said act of 1861, and the operation of the forfeiture therein provided for, and the said act of 1862,

168 and the operation of the grant therein made, set up, and assumed and claimed, and do now set up, assume, and claim that, under and by virtue of the operation of the aforesaid forfeiture and acts, they took and held, and do now hold, all and singular the said rights, properties, interests, things, and franchises, free, clear, and altogether discharged of and from the liabilities, debts, and obligations of contract incurred and entered into by said Minnesota & Pacific Railroad Company through and by themselves, (the said grantees,) as aforesaid, prior to that time, and especially free, clear, and discharged of and from the liabilities, trusts, and lien of the aforesaid deed of trust of July 31st, 1858, and of and from the claim and rights of the bondholders thereunder.

And your orators further show unto your honors, that each and all of

the said defendants to this bill, other than the said Minnesota and Pacific Railroad Company, claim to have derived some title to the property, rights, privileges, interests, and franchises enumerated in and conveyed by the said trust-deed to your orators and said Welch, of July 31st, 1858, and that they hold the same free, clear, and discharged of and from the lien of said trust-deed, and free, clear, and discharged from all and any liability of or for the debts so as aforesaid contracted, incurred, and entered into, for and on the account of the construction of said roads, and for the purchase of the lands and the construction of the road and road-beds, and the giving of value to the franchises which the said State first, and its said grantees and their assignees afterwards, took, held, and now hold, without paying any sum of money or thing of value whatever therefor. And that said act of 1862 was and is a valid act, controlling and binding upon said trustees and the bondholders under their
169 aforesaid trust deed, and operated a transfer in law, to the persons named in said act, of all the rights, assets, property, interests, and franchises conveyed to the said trustees, in and by the trust-deed of July 31st, 1858, aforesaid, divested of any lien or charge thereupon in favor of such bondholders. But your orators aver and charge, that if the intent, construction, and effect of the said acts of March 8th, 1861, and March 10th, 1862, or either of them, be to extinguish, without payment, the said debts incurred long before the passage of these acts as aforesaid, for and on account of the grading and construction of said roads and the purchase of lands for the use thereof, and secured by the deed of trust to your orators and said Welch as aforesaid, or to discharge or impair the obligations of the said contracts of debt, so as aforesaid, before the passage of said acts, or either of them, entered into, or to discharge or impair the obligations or duties of your orators, as surviving trustees of the trusts created and imposed upon them in and by the said trust-deed of July 31st, 1858, and their acceptance thereof, or in any manner affect their rights and duties thereunder, or the rights and legal claims of the holders of the said bonds secured thereby, then the said acts, and either of them, are so far in conflict with the tenth section of the first article of the Constitution of the United States, and so null and void. But your orators believe, aver, and charge that all the rights, title, and claim acquired by said State, by said forfeiture under said act of 1861, were, in fact and in law, so acquired and held, subject to all the debts, liabilities, and obligations of contract of the said Minnesota and Pacific Railroad Company and said State, before such forfeiture contracted and then existing, and especially subject to
170 the lien of the said trust-deed of the 31st of July, 1858, and the rights of the holders of bonds secured thereby, and that under and by virtue of such forfeiture the said State acquired, took, and held only the rights and interests of the whole body of the corporators or stockholders of the said Minnesota and Pacific Railroad Company, in and to the said property and franchises, and subject to all the then existing liabilities, debts, and obligations of contracts of the said company, in like manner and with like effect as such stockholders had before that time held the same, and by the said act of 1862 said State granted and conveyed to the persons therein named only such title as she had acquired and then held, under and by virtue of said forfeiture, under the said act of 1861, and that by said act of 1862, the grantees of the State therein named, and their successors and assigns, took and hold nothing more than the same rights, property, interests, and control of franchises which had been vested in and belonged to the whole body of the stockholders of said Minnesota and Pacific Railroad Company, before and at

the time of its said default and forfeiture under said act of 1861, and subject to all and the same liabilities, debts, and obligations of contracts then existing against said company, and especially subject to the trusts and liens of the said deed of trust of July 31st, 1858, and the rights and claims of the bondholders thereunder.

And, twenty-first. Your orators further show that in addition to the said six hundred and twenty-five bonds of said Minnesota and Pacific Railroad Company, so as aforesaid issued and delivered to the State of Minnesota, four hundred and thirty-three of the same series of bonds, with coupons annexed, hereinbefore described and set forth, were,
171 as aforesaid, long before the passage of said act of 1862, duly executed by said Minnesota and Pacific Railroad Company, under said trust-deed of July 31st, 1858; countersigned and registered by your orators and said Welch, trustees as aforesaid, and by them delivered to said company, and by it paid out and delivered to sundry persons in consideration of money by them loaned to it, for the construction of said roads—lands by them conveyed to it for the right of way and use of said roads, work, labor, and materials by them rendered, done, performed, and furnished in the grading, bridges, culverts, and partial completing of sixty-two and one-half miles of its said road, being the same property included and described in said act of 1862; which said bonds, with all, or nearly all, said annexed coupons, together with the interest upon said coupons, from the time the same became due and payable, remains wholly unpaid, and payment thereof, or of any part thereof, is wholly neglected and refused, though the same has been often and long since demanded, and which interest on said bonds and coupons so remaining due and unpaid amounts to more than two thousand dollars, to wit, to the sum of several hundred thousand dollars.

And your orators aver and charge that the said bonds and coupons, and the accrued interest on said coupons since the same have become due, are a subsisting and legal obligation and debt; and that the said trust-deed of July 31st, 1858, is a subsisting and valid security and lien in full force and effect, to secure the payment of the said bonds and coupons and interest, and is a prior lien and security of or to any other lien or incumbrance upon the lands, property, and franchises, or any of them, therein described, and takes precedence, as such lien, to any and all other trust-deeds, conveyances, or mortgages herein in this bill mentioned and referred to, or otherwise.

172 And your orators further show that all the defendants in this bill named, other than the Minnesota and Pacific Railroad Company, claim to have some title, ownership, rights, and interest in and to, and control over the same lands, properties, rights, interests, and franchises, or some of them, in said deed of trust of July, 1858, enumerated and thereby conveyed, in trust as aforesaid, to your orators and said Welch.

And the said defendants, although they and each of them have had full notice and knowledge of the said deed of trust, and that there are outstanding bonds, as aforesaid, issued thereunder and secured thereby, and that the same were issued in payment of and for creating and giving value to the roads, bridges, culverts, lands, franchises, &c., of said Minnesota and Pacific Company now claimed as aforesaid by said defendants, and actually held by them, and that all the aforesaid partly-completed parts of said roads had been made and constructed with the proceeds of said bonds, have been and are continually falsely representing and setting forth that their said title and claim is free, clear, and unincumbered by any prior title, lien, or incumbrance,

and especially free and clear of the title, lien, and incumbrance of said trust-deed of July, 1858. And said defendants have executed, as hereinafter set forth, what they falsely represent to be first and other mortgages, and first and other mortgage bonds, on the roads, lands, properties, and franchises, in and by said deed of trust of July, 1858, enumerated, described, and conveyed in prior trust and security, as aforesaid. And through and by means of such false representations that the same are free from such prior lien, said defendants are selling and disposing of their said falsely so called first and other mortgage bonds, secured by deeds of trust or mortgages of said lands, roads,
173 franchises, &c., first, as aforesaid, conveyed to your orators and said Welch, in trust as aforesaid, and have been and are constantly selling the said lands so conveyed to your orators and said Welch, and are falsely pretending and representing that said lands, and said roads and franchises, are free, clear, and unincumbered of or by any mortgage, trust-deed, or lien, except such as they themselves have executed and put upon the same, and especially that they are free and clear of any obligation, debt, lien, or incumbrance incurred, made, or executed by the said Minnesota and Pacific Railroad Company. And the most of the people or parties to whom the said defendants are making such false representations and deceptions are foreigners, not residing in this country, and emigrants from foreign countries to this country, who cannot read our language, and who, for that reason, are more easily deceived and imposed upon by such false representations and pretences, and who are, in fact, misinformed of the true state of facts hereinbefore set forth, and ignorant of said trust-deed of July, 1858, and the said prior rights of the holders of said outstanding bonds, issued thereunder. And through and by means of such false representations, false pretences and deceptions, so as aforesaid made to and practiced upon such persons, the said defendants have been and are continually selling and disposing of the same lands enumerated and described in said deed of trust of July, 1858, and conveyed to your orators and said Welch, in trust, and for the security of the said holders of bonds issued thereunder; and said defendants are using and appropriating the proceeds of such sales of said lands for and to uses and purposes of their own, and wholly foreign to and disconnected from
174 the uses and trusts of said deed of trust of July, 1858, and thus are wasting the security of the holders of the said outstanding bonds, under said deed of July, 1858, to their irreparable injury and damage.

And all said sales of bonds and lands are so made by said defendants after full notice in fact as well as in law, and with knowledge in fact of the said trust-deed of July, 1858, and the claims of boudholders, thereunder, as aforesaid, and well knowing that all their said defendants' rights in the premises were derived subsequent to, and are subordinate and subject to the rights of said bondholders under said deed of trust of July, 1858.

And your orators say that the aforesaid acts and doings, sales of bonds and lands, to said persons who are so as aforesaid deceived, and in fact ignorant of the rights of your orators, and their said cestuis que trust, under said deed of July, 1858, have a tendency to, and threaten to, and, if continued will, embarrass your orators in the administration of their said trust, obligations, and duties, and impair the efficiency of said trust, and the security thereby created, by involving your orators in a multiplicity of expensive suits with the said purchasers of said lands from said defendants, claiming to be innocent purchasers thereof.

And owing to the great number of such purchasers of lands, unless such sale shall be enjoined and restrained, who upon such purchase make their homes upon the same, the attempt by your orators to execute the obligations of their said trust and enforce their prior lien upon the same lands may, and probably will, lead to disturbances of the public peace, and great detriment to the public good.

175 And the said defendants, the Saint Paul and Pacific Railroad Company; the Stillwater and Saint Paul Railroad Company; the first division of the Saint Paul and Pacific Railroad Company, and the Northern Pacific Railroad Company, each and all are in the actual, exclusive possession, use, enjoyment, and control of some parts; and together said defendants are in such actual and exclusive possession, use, enjoyment, and control of the whole of the same property, lands, rights, interests, privileges, immunities, and franchises, so as aforesaid first conveyed in trust to your orators and said Welch by said deed of trust of July 31st, 1858, and wrongfully and unlawfully deny to your orators the right of taking possession and use of the same, under the provision of their said trust-deed, with the view of the execution of their trusts, and the payments of said overdue coupons and interest; and said defendants wholly refuse to pay such coupons and interest themselves, or to allow your orators to have or receive any of the said assets or proceeds of sales thereof for such purposes; and your orators are unable to enter into or take possession of the same without great danger of a breach of the public peace, and a multiplicity of suits; which aforesaid claims of right, title, possession, and control by said defendants are founded, justified, and defended solely upon and by the said several acts of legislation, doings, and proceedings hereinbefore set forth, and upon no other laws or facts.

And the said Northern Pacific Railroad Company now claims to own (and has constructed its road upon) a portion of the same line of road described in said act of Congress of March 3d, 1857, and said act

176 of the legislative assembly of Minnesota of May 22d, 1857, and in the said deed of trust of July 31st, 1858, as a branch from St. Anthony, via Saint Cloud and Crow Wing, to the navigable waters of the Red River of the North, at St. Vincent—to wit, that part of said branch-line extending from Crow Wing aforesaid towards the said Red River of the North, a distance of about one hundred and twenty-six miles; and said company claims to own, and is in possession, use, and control of the lands pertaining to and granted in aid of the construction of said part of said line by the acts hereinbefore cited, which are part of the same lands so as aforesaid conveyed in trust to your orators and said Welch by said deed of trust of July 31st, 1858. And said company claims that said lands enure to it, and are held by it free, clear, and discharged of and from the prior lien of said trust-deed to your orators and said Welch, and free and clear of all claims or lien in favor of the holders of bonds issued under and secured by said trust-deed. And said defendant, the Northern Pacific Railroad Company, has made and executed a trust-deed or mortgage covering and embracing said line of road and lands, as hereinafter set forth, and is selling and disposing of said lands from time to time, and its bonds, purporting to be secured by a first lien thereon, to ignorant persons and foreigners, as hereinbefore more fully stated, and is appropriating the proceeds of such sales to its own exclusive use, and wasting, and threatening to wholly waste, that part of the security of the holders of the bonds issued under said deed of trust of July 31st, 1858; which said sales of lands and bonds it is enabled to make, and does in fact make, through and by

means of its said false representations, that said lands are not subject to any prior lien, and especially to said first lien of said deed of trust of July 31st, 1858.

177 And your orators further show unto your honors that the following conveyances, among others, by way of mortgage, lien, and incumbrance upon the lands, property, and franchises, or some parts thereof, which were so as aforesaid conveyed in trust to your orators and said Welch by said deed of trust of July 31, 1858, have been executed and delivered by said defendants, or some of them, subsequently to said July 31, 1858, and filed in the office of the secretary of state for the State of Minnesota, to wit:

1st. A deed of trust or mortgage by the said Saint Paul and Pacific Railroad Company, bearing date the 11th day of March, 1862, conveying to one Walter L. Cutting, of the city and State of New York, ten miles of the railroad of said company, with appurtenances and franchises pertaining thereto, extending from St. Paul to St. Anthony, in trust to secure the payment of said one hundred and twenty thousand dollars of the bonds of said company hereinbefore referred to, and agreed to be paid, and in fact paid, to said Winters, Marshman, and Drake, as hereinbefore stated.

2d. Another deed of trust or mortgage by the said Saint Paul and Pacific Company, bearing date June 2, 1862, conveying to Russell Sage, of Troy, in the State of New York, and Samuel J. Tilden, of the city of New York, in the same State, eighty miles of the road of the said company, extending from St. Paul to St. Anthony, and thence up the Mississippi River, via Anoka, including all equipments, appurtenances, and franchises appertaining thereto, in trust to secure the payment of seven hundred thousand dollars of other bonds of said company.

178 3d. Another deed of trust or mortgage by the same company, bearing date the said 2d day of June, 1862, conveying to the said defendants Edmund Rice and Horace Thompson and said Samuel J. Tilden, of the State of New York aforesaid, three hundred and seven thousand two hundred acres of land, and also the aforesaid eighty miles of railroad, equipments, appurtenances, and franchises, in trust to secure the payment of one million two hundred thousand dollars of other bonds of the said company.

4th. A deed of trust or mortgage by the said first division of the Saint Paul and Pacific Railroad Company, bearing date the 1st day of March, 1864, conveying to one John P. Yelverton and Samuel J. Tilden, both of the city and State of New York, one hundred and fifty miles of said railroad, extending from St. Anthony to a point near the foot of Big Stone Lake, including appurtenances and franchises appertaining thereto, in trust, to secure the payment of one million five hundred thousand dollars of the bonds of the said first division of the Saint Paul and Pacific Railroad Company.

5th. Another deed of trust or mortgage by the said last-named company, bearing date the said first day of March, 1864, conveying to said Edmund Rice, Horace Thompson, and Samuel J. Tilden the said last-mentioned one hundred and fifty miles of road and the lands pertaining thereto, to wit: five hundred and seventy-six thousand acres of land, in trust, to secure the payment of three million of dollars of other bonds of the said last-named company.

6th. Another deed of trust or mortgage by the said first division of the Saint Paul and Pacific Railroad Company, bearing date the

179 1st day of October, 1865, conveying to said defendants, George L. Becker and Horace Thompson, and to one George T. M. Davis, of

New York City, five hundred and twelve thousand acres of land, and also the entire road and its equipments, extending from St. Paul to Watab aforesaid, in trust, to secure the payment of two million eight hundred thousand dollars of other bonds of said last-named company.

7th. Another deed of trust or mortgage by the said last-named company, bearing date the 1st day of July, 1868, conveying to said George L. Becker, Horace Thompson, and Samuel J. Tilden seven hundred and sixty-eight thousand acres of land, and the entire railroad aforesaid from St. Anthony to Breckenridge, (said to be) a distance of two hundred and ten miles, in trust, to secure the payment of six millions of dollars of other bonds of the said company.

8th. Another deed of trust by the said first division of the St. Paul and Pacific Railroad Company, bearing date the first day of December, 1870, conveying to said George L. Becker and Horace Thompson, and William G. Moorhead, of Philadelphia, in the State of Pennsylvania, the said road from St. Paul to Breckenridge, (said to be) a distance of two hundred and sixteen miles, and ten sections of land per mile of said road, to secure the payment of three million dollars of other bonds of said last-named company.

9th. Another deed of trust or mortgage by the aforesaid Saint Paul and Pacific Railroad Company, bearing date the 1st day of April, 1871, conveying to the said George L. Becker, Horace Thompson, and William G. Moorhead the branch-line of said railroad from St. Cloud to St. Vincent; and also the line from Watab, via Crow Wing, to Brain-
180 ard, with the appurtenances, equipments, and franchises, and also the lands pertaining to each of said lines, estimated at two millions two hundred thousand acres, in trust, to secure the payment of fifteen millions of dollars of other bonds of the said Saint Paul and Pacific Railroad Company.

10th. A deed of trust by the said defendant, the Stillwater and Saint Paul Railroad Company, bearing date November 1, 1870, conveying to said defendants, Samuel M. Felton and William G. Moorhead, its road from Stillwater to Saint Paul, with equipments and appurtenances, and eighty-three thousand two hundred acres of land, in trust, to secure the payment of four hundred thousand dollars of its bonds.

11th. A deed of trust or mortgage by the said defendant, the Northern Pacific Railroad Company, bearing date on or about the first day of July, 1870, conveying to said defendants, Jay Cooke and J. Edgar Thomson, its said company's road, and equipments, and lands, including, as hereinbefore set forth, a large portion and quantity of the same lands long before as aforesaid conveyed to your orators and said Welch by said deed of trust of July 31, 1858, a part only (the precise amount thereof being unknown to your orators) of which said bonds have been issued, sold, and negotiated; but your orators aver that the whole aggregate amount of said bonded indebtedness provided for by the aforesaid trust-deeds or mortgages greatly exceeds the fair and real value of the said trust-estate covered by and embraced in said deeds.

And the said trustees to whom said conveyances have been so as aforesaid made claim to hold the said property, lands, and franchises upon the trusts and for the uses and purposes in their said several deeds expressed, and to the exclusion of all right, claim, or title of your orators as such surviving trustees as aforesaid, and of the said bondholders by them represented.

And your orators further show that the said above-named trustees, Walter L. Cutting, Russell Sage, Samuel J. Tilden, John P. Yelverton, and George T. M. Davis are not made parties to this bill, for the reason

that they and each of them are citizens of the State of New York,
181 the same as your orator, the said Cowles, but your orators are willing that they should be made parties to this bill, if they will consent thereto, and this honorable court shall deem it competent to make them such upon their consent.

And your orators further show that the said Minnesota and Pacific Railroad Company never established or kept any office or place of business in the city of New York where its said bonds and coupons were made payable as aforesaid; and the said defendants, the Minnesota and Pacific Railroad Company, the Saint Paul and Pacific Railroad Company, and the first division of the Saint Paul and Pacific Railroad Company, though often and long since requested thereto, have neglected and refused to pay the said past-due coupons for interest attached to the aforesaid bonds issued under and secured by said deed of trust of July 31st, 1858, or any of them which fell due since the passage of said act of March 10th, 1862, but have wholly refused to pay the same and the interest thereon, and deny all and any liability, obligation, or debt by reason of the same.

And your orators further show that the said William H. Welch, their cotrustee as aforesaid, died about the year 1865. And on or about the twenty-third day of October, eighteen hundred and seventy-two, the holders of two hundred and seventy-six thousand dollars in amount of said bonds so issued by said Minnesota and Pacific Railroad Company, and countersigned and registered by your orators and said Welch, as hereinbefore set forth, and now outstanding, and the interest on the same, being in arrear and unpaid for many years, as aforesaid, made a request of your orators, as such surviving trustees, that, pursuant
182 to the power and duty conferred and imposed upon them in and by the said deed of trust of July 31st, 1858, they should enter upon, and take possession of, and sell all and singular the said premises in and by the said deed of trust conveyed and transferred to them, or so much and such parts thereof as may be necessary to pay and discharge the said interest so as aforesaid remaining due and unpaid; or if, under the circumstances now existing, your orators deemed a compliance with the request made as above impracticable or unadvisable, that then they would immediately proceed in *in* such other manner as might seem most speedy and effective to execute the trust reposed in and accepted by them in and by the said trust-deed, to the end that they, the said bondholders, might receive their interest upon said bonds, so long past due, and most unjustly withheld from them.

All which actings and doings are contrary to equity and good conscience, and to the manifest wrong and injury of your orators and the bondholders so as aforesaid represented by them.

In consideration whereof, and forasmuch as your orators can have proper and adequate relief in the premises only in this honorable court:

To the end, therefore, that the said defendants, the Minnesota & Pacific Railroad Company, the St. Paul & Pacific Railroad Company, The first division of the St. Paul & Pacific Railroad Company, the Northern Pacific Railroad Company, the Stillwater & St. Paul Railroad Company, Edmund Rice, Horace Thompson, George L. Becker, William G. Morehead, Samuel M. Felton, Jay Cooke, and J. Edgar Thomson, and their confederates, m'y true, full, and perfect answer made to all and singular the matters hereinbefore stated and charged, (your orators hereby
183 expressly waiving the necessity of the answers of such defendants being put in on the oaths of such defendants, or the oath of either of them.)

And that it may be adjudged and decreed that the said deed of trust of July 31, 1858, is a valid instrument, in full force and effect, and is a valid and subsisting lien first and prior to all other liens and incumbrances upon all the lands, property, rights, interests, franchises, and things therein enumerated and described, for the security of all costs, charges, and expenses for the execution of said trust, and second, for securing the payment of the aforesaid bonds of the said defendant, the Minnesota & Pacific Railroad Company, hereinbefore mentioned, and issued under and in accordance with the provisions of said trust-deed last named, together with the interest-warrants or coupons to such bonds annexed, with the interest upon said coupons from and after the maturity of the same respectively, and now remaining due and unpaid, and that all deeds, alienations, mortgages, deeds of trust, conveyances, or pretended deeds, alienations, mortgages, deeds of trust, or supplements thereto, or to any other deeds of trust or conveyances hereinbefore mentioned, made, and executed subsequently to the 31st day of July, 1858, by the defendants, the Minnesota & Pacific Railroad Company, and all deeds or pretended deeds of trust or otherwise, or mortgages or alienations hereinbefore set forth and made subsequent to the date last aforesaid by the said defendants, the St. Paul and Pacific Railroad Company, the first division of the St. Paul & Pacific Railroad Company, the Stillwater & St. Paul Railroad Company, and the Northern Pacific Railroad Company,
or to any other person or company, if such there are, as herein-
184 before set forth, to others of the defendants, or to any other person or persons in that behalf hereinbefore named, or any others, if any, not hereinbefore set forth, so far as the same or any one or more of them relate to and include any of the property, interests, lands, rights, franchises, or things whatsoever enumerated or described in the said deed of trust of July 31st, 1858, are subordinate and subject to the trusts and liens created in and by said trust-deed of July 31st, 1858, which is a prior and superior first lien and charge upon the said property, interests, lands, rights, franchises, or things conveyed to your orators and the said Welch in trust, as aforesaid.

And that an account may be taken, by and under the direction of this honorable court, of the various sums of money that are outstanding, due, and owing under and secured by such trust-deed of July 31, 1858, including the said bonds, coupons, and interest upon the same since the maturity of such coupons, respectively, and all charges under such trust-deed.

And that the said defendants, or some one or more of them, and such one or more of them as the court may deem properly and equitably liable thereto, may render an account of all the property, assets, monies, and things so as aforesaid covered by or embraced and enumerated in the aforesaid deed of trust of July 31, 1858, or of the avails or proceeds thereof, which may have been received by or may have come to the possession or use of the said last mentioned or designated defendants, or any one or more of them.

And that it may be decreed that such last designated defendant or defendants may be decreed to pay over to your orators any and all such
monies, assets, and property as may so be found to have come to
185 the hands of such defendants, or any of them, or so much thereof as may be requisite to cover, liquidate, or pay all charges for the execution of the trusts under such trust-deed of July 31, 1858, and the costs and charges of this action, and the matured interest upon the bonds issued under such trust-deed aforesaid, and the interest that shall then also have accrued upon the interest-warrants or coupons to such

bonds annexed; and if anything shall then remain, that the same be deposited in such manner as the court shall direct, to answer the purposes of a sinking-fund, to be applied towards the payment of the principal of said bonds, if any, and the future interest to accrue upon the said bonds.

And in case of the failure of such defendants, or any of them, to so account and pay over within some certain time, to be designated by this court, that your orators be let into the full, quiet, undisturbed, and actual possession of all and singular the premises conveyed, or transferred, or expressed, or intended so to be in and by said trust-deed of May 31st, 1858, and of the railroad or railroads, with their appurtenances, mentioned and intended in and by such deed of trust, to the end that yours orators may use and operate, and keep in repair, the said roads and lines of road, as in such trust-deed is also mentioned, and apply the revenue arising therefrom, first, to the payment of the interest upon the bonds of the company, and accumulated interest upon such coupons that may then be due upon the bonds of the said Minnesota and Pacific Railroad Company, and the surplus, if any, in payment of the principal of such bonds.

Or, that your orators, if the court shall so deem right, best, and proper, sell, or, under the order and decree of the court, that there
186 be sold such and all and singular the said railroads, or some or more of them, or all of the property, rights, interests, lands, railroads, and franchises in such deed of trust last aforesaid enumerated and intended in and by such trust-deed last aforesaid, or for so much thereof as shall be necessary to realise and obtain all of the monies that may be then due, owing and liable to be paid under the provisions of such trust-deed, with all expenses, costs, and charges that may then have accrued or shall be necessarily incurred in the proper discharge of all the trust duties of yours orators; and, upon such sale, that the said defendants, and each and every of them, be forever barred and foreclosed of and from any and all right, title, interest, or equity of redemption in or to such property, rights, interest, lands, railroads, and franchises, and in and to each and every of them and every part thereof.

Or, that your orators may have such further, or such other, or such different, or additional, or cumulative relief as shall be meet and proper, and to the court shall seem requisite, necessary, or advisable in the premises, with the proper costs and charges of your orators in the premises.

May it please the court to grant unto your orators the writ of subpœna of the United States of America, issuing out of and under the seal of this court, to be directed to the defendants hereinbefore named, commanding them and each and every of them, by a certain day, and under a certain penalty, to be therein inserted, to be and appear in this honorable court, and then and there to answer in the premises, but not under oath; and, further, to stand to, perform, and abide such further order, direction, and decree as may be made against them, and shall be agreeable to equity and good conscience.

187 And, further, may it please your honors to grant to your orators the writ of injunction, commanding and enjoining the said defendants, and each and every of them, that they, and each and every of them, their agents, attorneys, do, during the pendency of this suit, and until the further order of this court herein, absolutely desist and refrain from in any way selling, aliening, conveying, encumbering, or otherwise charging with mortgage or deed of trust, or otherwise, any of the

deeds, properties, or franchises mentioned or intended in or by the aforesaid trust-deed of July 31, 1858, or from parting with the same, or any mortgage or mortgages charged therein and created in favor of said defendants, or of any one or more of the same, or from parting with any monies which they or either of them may have received as the proceeds or consideration of any such sale or sales, mortgage or mortgages, trust-deed or trust-deeds; and further requiring and commanding that any and all such monies, proceeds, or amounts of any and all such sales, mortgages, or trust-deeds, be, until the further order of the court herein, deposited in some proper bank or other place of safe deposit, to the credit of this cause, or in such other form as the court may designate, to abide the further order of the court in the premises.

And your orators further pray, in pursuance of the provisions of the statute in such case made and provided, that as to those several and respective persons, who are hereinbefore in this bill of complaint named as parties defendant, but who are not inhabitants of the district of Minnesota, viz, Wm. G. Moorehead, Samuel M. Felton, Jay Cooke, and J. Edgar Thomson, and the Northern Pacific Railroad Company, a
188 corporation existing under the laws of the United States, but having an office in the said district of Minnesota, but whose president is not a resident of said district, if they, or any of them, be not found in said district, and shall not voluntarily appear herein, that, in such case, an order be made by the court, directing each and every said last-named parties as shall not so voluntarily appear, to appear, plead, answer, or demur to this bill of complaint at or before a certain time, in such order to be named, and that such order be served on each such last-named defendants who shall not so voluntarily appear, if practicable, wheresoever found; or, if such personal service be not practicable, then, and in such case, that such order be published in such manner as the court shall direct.

And your orators will ever pray, &c.

MASTERSON & SIMONS,
Solicitors for the Complainants.

HENRY F. MASTERSON,
Of Counsel.

UNITED STATES OF AMERICA,
Southern District of New York:

Edward P. Cowles, being duly sworn, deposes and says that he is one of the complainants in the foregoing bill named, and has read the same, and knows the contents thereof; that the said bill is true of his own knowledge, except as to those matters therein set forth on information and belief, and, as to those matters, he believes it to be true.

EDWARD P. COWLES.

Subscribed and sworn before me the sixth day of January, A. D. 1873.

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

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199 Whereupon, upon application of said plaintiffs, a writ of subpœna was duly issued out of the clerk's office of said court, duly tested, under the seal of said court, and in the words and figures following, viz:

UNITED STATES OF AMERICA,
District of Minnesota, ss:

The President of the United States of America to the Minnesota and Pacific Railroad Company, the Saint Paul and Pacific Railroad Company, the first division of the Saint Paul and Pacific Railroad Company, the Stillwater and Saint Paul Railroad Company, the Northern Pacific Railroad Company, Edmund Rice, trustee, &c., Horace Thompson, trustee, &c., George L. Becker, trustee, &c., William G. Moorhead, trustee, &c., Samuel M. Felton, trustee, &c., Jay Cooke, trustee, &c., and J. Edgar Thompson, trustee, &c., greeting:

You are hereby commanded to appear before our judges of our circuit court of the United States of America for the district of Minnesota, at St. Paul, in said district, on the first Monday in the month of March next, to answer the bill of complaint of Elon Farnsworth and Edward P. Cowles, this day filed in the clerk's office of said court in said Saint Paul, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment be-
200 ing pronounced against you by default.

To the marshal of the district of Minnesota to execute.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at Saint Paul aforesaid, this twentieth day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-seventh year.

[SEAL OF COURT.] H. E. MANN, *Clerk.*

Memorandum.

The within-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Saint Paul aforesaid, on or before the day to which this writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

H. E. MANN, *Clerk.*

MASTERSON & SIMONS,
Plaintiffs' Solicitors.

Which said writ of subpœna was afterwards returned to said clerk's office by the marshal of the district of Minnesota, by him indorsed in the words and figures following, viz:

DIST. OF MINNESOTA, *ss*:

201 I hereby authorize and empower J. Gregory Smith to serve the within writ on the within-named, the Saint Paul & Pacific Railroad Company.

AUG. ARMSTRONG,
U. S. Marshal.

ST. PAUL, *Ja'y* 20, '73.

DIST. OF MINNESOTA, *ss*:

I hereby authorize and empower B. Scott, jr., to serve the within writ on Wm. G. Moorhead, Saml. M. Felton, Jay Cooke, & J. Edgar Thompson.

AUG. ARMSTRONG,
U. S. Marshal.

ST. PAUL, *Ja'y* 20, 1873.

DISTRICT OF MINNESOTA, *ss*:

I hereby certify that I served the annexed writ on the within-named, the Minnesota and Pacific Railroad Company, personally, by handing to and leaving with Edmund Rice, president of said railroad company, a true copy thereof, at Saint Paul, in said district, January 28, 1873, and served the same on Edmund Rice, trustee, &c., personally, by handing to and leaving with him a true copy thereof, at St. Paul, in said district, Jan'y 28, 1873.

And I do further certify that I served the same on the within-named, the first division of the St. Paul and Pacific Railroad Company, personally, by handing to and leaving with George L. Becker, the president of said railroad company, a true copy thereof, at St. Paul, in said district, January 27, 1873, and served the same on George L.
202 Becker, trustee, &c., personally, by handing to and leaving with him a true copy thereof, at St. Paul, in said district, Jan'y 27, 1873.

And I do further certify that I served the said writ on the Stillwater and St. Paul Railroad Company, personally, by handing to and leaving with H. R. Murdock, the secretary of said railroad company, a true copy thereof, at Stillwater, in said district, Jan'y 28, 1873.

And I do further certify that I served the said writ on the Northern Pacific Railroad Company, personally, by handing to and leaving with C. W. Mead, general manager of said railroad, a true copy thereof, at Saint Paul, in said district, Feb'y 24, 1873.

AUG. ARMSTRONG,
U. S. Marshal,
By J. R. CLEVELAND,
Deputy.

DISTRICT OF MINNESOTA, *ss*:

I hereby certify that I served the annexed writ on Horace Thompson, trustee, &c., personally, by handing to and leaving with him a true copy thereof, at Saint Paul, in said district, Jan'y 23, 1873.

AUG. ARMSTRONG,
U. S. Marshal,
By J. P. McILRATH, *Dep'y.*

I hereby certify that I served the annexed writ on the Saint Paul and Pacific Railroad Company, personally, by handing to and leaving

with Walter Hutchinson, the sec'ty of said railroad company, a
203 true copy thereof, at Boston, in the State of Massachusetts, Feb'y 5, 1873.

AUG. ARMSTRONG,
U. S. Marshal.
By J. GREGORY SMITH,
Spe. Dep'y.

I hereby certify that I served the annexed writ on Wm. G. Moorhead, trustee, &c., Samuel M. Felton, trustee, &c., Jay Cooke, trustee, &c., & J. Edgar Thompson, trustee, &c., each personally, by handing to and leaving with each of them a true copy thereof, at *at* Philadelphia, in the State of Pennsylvania, Feb'y 10, 1873.

AUG. ARMSTRONG,
U. S. Marshal,
By B. SCOTT, JR.,
Spe. Dep'y.

And afterwards, to wit, at rules, held at the clerk's office of said court, on the seventh day of March, A. D. 1873, the following proceedings, among others, were had, to wit:

ELON FARNSWORTH ET AL., TRUSTEES,
vs.
THE MINNESOTA AND PACIFIC RAILROAD COMPANY ET AL.

And now come the defendants, the Stillwater and St. Paul Railroad Company, Jay Cooke, Wm. G. Moorhead, and Samuel M. Felton, and the Northern Pacific Railroad Company, by James Smith, jr., their solicitor, on whose motion it is ordered that the appearance of said defendants be, and the same is hereby, entered.

204 ELON FARNSWORTH & EDWARD P. Cowles
vs.
THE MINNESOTA AND PACIFIC RAILROAD COMPANY, Edmund Rice, and others.

And now come the defendants, the Minnesota and Pacific Railroad Company, the first division of the Saint Paul & Pacific Railroad Company, Edmund Rice, George L. Becker, and Horace Thompson, by Messrs. Bigelow, Flandrau & Clark, their solicitors, on whose motion it is ordered that the appearance of said defendants be, and the same is hereby, entered.

And afterwards, at rules, in the clerk's office of said court, to wit, on the 31st day of March, A. D. 1873, the following proceeding, among others, was had, viz:

ELON FARNSWORTH AND EDWARD P. COWLES, trustees, &c.,
vs.
THE MINNESOTA AND PACIFIC RAILROAD COMPANY ET AL.

And now come J. Edgar Thompson and the Saint Paul & Pacific

Railroad Company, defendants in the above-entitled suit, by James Smith, jr., their solicitor, on whose motion it is ordered that the appearance of said defendants be, and it is hereby, entered.

And afterwards, to wit, on the 17th day of May, 1873, came the defendant, the Northern Pacific Railroad Company, by Jas. Smith, jr., and Cushman K. Davis, esquires, its solicitors, and filed in the clerk's
205 office of said court its demurrer to the plaintiffs' bill of complaint, in writing, in the words and figures following, viz:

United States circuit court, district of Minnesota. In equity.

ELON FARNSWORTH AND EDWARD P. COWLES, trustees,
vs.
THE MINNESOTA & PACIFIC RAILROAD COMPANY, the Northern Pacific Railroad Company, & others.

The demurrer of the Northern Pacific Railroad Company to the bill of complaint of the above-named Elon Farnsworth and Edward P. Cowles, complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer sheweth—

That the said complainants have not in and by their said bill made or stated such a case as doth or ought to entitle them to any such relief or discovery as is thereby sought and prayed for against or from this defendant;

That the said complainants in their said bill have not made or stated such a case as shows any title in or right to any of the lands or
206 property mentioned in folios 525, 526, 527, and 528 of said bill, or in any other part thereof, as claimed by this defendant;

That the said bill of complaint shows and states an unlawful claim to such lands and property by the said complainants:

Wherefore this defendant demands the judgment of this honorable court whether it shall be compelled to make any other or further answer to the said bill, or to any of the matters or things therein contained, and prays to be herein dismissed with its reasonable costs in that behalf sustained.

JAMES SMITH, JR.,
C. K. DAVIS,
Solicitors for the Northern Pacific Railroad Company.

JAMES SMITH, J'.,
C. K. DAVIS,
Counsel.

I, C. K. Davis, do hereby certify that I am of counsel for the defendant, the Northern Pacific Railroad Company, and that in my opinion the annexed demurrer is well founded in point of law.

C. K. DAVIS.

DISTRICT OF MINNESOTA, *ss:*

C. K. Davis, having been duly sworn, deposes, on behalf of the defendant, the Northern Pacific Railroad Company, that he is the attorney and counsel of the said defendant, and makes this affidavit because

207 he is more intimately acquainted with the facts and circumstances mentioned in the said bill than any of said defendants' officers. Deponent further says that the annexed demurrer is not interposed for delay.

C. K. DAVIS.

Subscribed and sworn to before me this 17th day of May, A. D. 1873.

WM. A. SPENCER,
U. S. Commissioner.

And afterwards, to wit, on the third day of June, A. D. 1873, came the defendants, Edmund Rice, Horace Thompson, and George L. Becker, by Messrs. Bigelow, Flandrau & Clark, their solicitors, and filed in the clerk's office of said court their demurrer to the plaintiff's bill of complaint, in writing; which demurrer is in the words and figures following, viz:

UNITED STATES OF AMERICA:

Circuit court of the United States in and for the district of Minnesota.
In equity.

DISTRICT OF MINNESOTA, *ss*:

Demurrer of Edmund Rice, Horace Thompson, and George L. Becker, defendants, to the bill of complaint of Elon Farnsworth and Edward P. Cowles, complainants, against the Minnesota and Pacific Rail-
208 road Company, the Saint Paul and Pacific Railroad Company, the first division of the Saint Paul and Pacific Railroad Company, the Stillwater and St. Paul Railroad Company, the Northern Pacific Railroad Company, William G. Moorhead, Samuel M. Felton, Jay Cooke, J. Edgar Thompson, and the said Edmund Rice, Horace Thompson, and George L. Becker, defendants.

These defendants, Edmund Rice, Horace Thompson, and George L. Becker, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer do show:

That the said complainants have not, in and by their said bill, made or stated such a cause as does or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against these defendants respectively.

Wherefore these defendants respectively demand the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

BIGELOW, FLANDRAU CLARK,
209 *Solicitors for Defendants Rice, Thompson, and Becker.*
H. R. BIGELOW,
Of Counsel.

UNITED STATES OF AMERICA.

Circuit court of the United States in and for the district of Minnesota.

I, Horace R. Bigelow, of Saint Paul, in said district, a counsellor of

this court, do hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

HORACE R. BIGELOW.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

Edmund Rice, Horace Thompson, and George L. Becker, all of Saint Paul, in said district, three of the defendants named in the foregoing demurrer, being first duly sworn, do*th*, each for himself, depose and say that the said demurrer is not interposed for delay.

EDMUND RICE.
GEORGE L. BECKER.
HORACE THOMPSON.

Subscribed and sworn to before me this 31st day of May, A. D. 1873.
[SEAL OF COURT.] H. E. MANN, *Clerk.*

210 And on the same day came the defendant, the Minnesota and Pacific Railroad Company, by Messrs. Bigelow, Flandrau and Clarck, its solicitors, filed in the clerk's office of said court its demurrer to the plaintiff's bill of complaint, in writing, which demurrer is in the words and figures following, viz:

UNITED STATES OF AMERICA.

Circuit court of the United States in and for the district of Minnesota.
In equity.

DISTRICT OF MINNESOTA, *ss:*

Demurrer of the Minnesota & Pacific Railroad Company, defendant, to the bill of complaint of Elon Farnsworth and Edward P. Cowles, complainants, against The Saint Paul & Pacific Railroad Company, Edmund Rice, Horace Thompson, George L. Becker, the first division of the Saint Paul & Pacific Railroad Company, William G. Moorhead, the Stillwater and St. Paul Railroad Company, Samuel M. Felton, the Northern Pacific Railroad Company, J. Cooke, J. Edgar Thompson, and said Minnesota and Pacific Railroad Company, defendants.

This defendant, the Minnesota and Pacific Railroad Company, by protestation, not confessing nor acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur
211 thereto, and for cause of demurrer showeth:

That the said complainants have not, in and by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

Wherefore this defendant demands the judgment of this honorable court whether this defendant shall be compelled to make any further or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

BIGELOW, FLANDRAU & CLARK,
Sols. for Defendant, the Minnesota and Pacific Railroad Company.

H. R. BIGELOW,
Of Counsel.

UNITED STATES OF AMERICA.

Circuit court of the United States in and for the district of Minnesota.

I, Horace R. Bigelow, of St. Paul, Minnesota, a counsellor of this court, do hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

HORACE R. BIGELOW.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

212 Edmund Rice, of the city of Saint Paul, in said district, being duly sworn, says that he is the president of the Minnesota and Pacific Railroad Company named in the foregoin g demurrer, and that said demurrer is not interposed for delay.

EDMUND RICE.

Subscribed and sworn to before me this 31st day of May, A. D. 1870.
[SEAL OF COURT.] H. E. MANN, *Clerk.*

And on the same day came the defendant, the first division of the St. Paul & Pacific Railroad Company, by Messrs. Bigelow, Flandrau, & Clark, its solicitors, and filed in the clerk's office of said court its demurrer to the plaintiff's bill of complaint, in writing, which demurrer is in the words and figures following, viz:

UNITED STATES OF AMERICA.

Circuit court of the United States in and for the district of Minnesota.
In equity.

DISTRICT OF MINNESOTA, *ss:*

Demurrer of the first division of the Saint Paul & Pacific Railroad Company, defendant, to the bill of complaint of Elon Farns-
213 worth and Edward P. Cowles, complainants, against the Minnesota and Pacific Railroad Company, the Saint Paul & Pacific Railroad Company, Edmund Rice, Horace Thompson, George L. Becker, William G. Moorhead, the Stillwater and Saint Paul Railroad Company, Samuel M. Felton, The Northern Pacific Railroad Company, Jay Cooke, J. Edgar Thompson, and said the first division of the St. Paul and Pacific Railroad Company, defendants.

The defendant, the first division of the Saint Paul & Pacific Railroad Company, by protestation, not confessing nor acknowledging all or any of the matters and things in the said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer sheweth:

That the said complainants have not in and by their said bill made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

Wherefore this defendant demands the judgment of this honorable court whether this defendant shall be compelled to make any further or other answer to the said bill or any of the matters and things therein

contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

BIGELOW, FLANDRAU & CLARK,
Sols. for Deft., the First Division of the St. Paul & Pacific Railroad Company.

214 H. R. BIGELOW,
Of Counsel.

UNITED STATES OF AMERICA.

Circuit court of the United States in and for the district of Minnesota.

I, Horace R. Bigelow, of Saint Paul, Minnesota, a counsellor of this court, do hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

HORACE R. BIGELOW.

UNITED STATES OF AMERICA,
District of Minnesota, ss :

George L. Becker, of the city of Saint Paul, in said district, being duly sworn, says that he is the president of the first division of the St. Paul & Pacific Railroad Company named in the foregoing demurrer, and that said demurrer is not interposed for delay.

GEORGE L. BECKER.

Subscribed and sworn to before me this 31st day of May, A. D. 1873.
[SEAL OF COURT.] H. E. MANN, *Clerk.*

215 And afterwards, at rules, in the clerk's office of said court, to wit, on the 2nd day of June, A. D. 1873, the following proceeding among others, was had, viz :

ELON FARNSWORTH AND EDWARD P. COWLES, surviving trustees, &c.,
vs.
THE MINNESOTA AND PACIFIC RAILROAD COMPANY et al.

And now come the plaintiffs, by Messrs. Masterson & Simons, their solicitors, on whose motion it is ordered that the demurrers of the defendants, the Minnesota & Pacific Railroad Company, the first division of the Saint Paul and Pacific Railroad Company, the Northern Pacific Railroad Company, Edmund Rice, Horace Thompson, and George L. Becker, to the plaintiff's bill of complaint, be and the same are hereby set down for hearing at the next general term of said court, to be held on the 16th day of June, A. D. 1873, at the opening of court on that day or as soon thereafter as counsel can be heard.

And afterwards, to writ, on the 12th day of June, A. D. 1873, came the said defendant, the St. Paul & Pacific Railroad Company, by James Smith, jr., its solicitor, and filed in the clerk's office of said court its demurrer to the plaintiffs' bill of complaint, in writing, and in the words and figures following, viz :

UNITED STATES OF AMERICA.

Circuit court of the United States in and for the district of Minnesota.
In equity.

216 DISTRICT OF MINNESOTA, *ss:*

Demurrer of the Saint Paul & Pacific Railroad Company, defendant, to the bill of complaint of Elon Farnsworth and Edward P. Cowles, complainants, against the Minnesota & Pacific Railroad Company, the Saint Paul & Pacific Railroad Company, Edmund Rice, Horace Thompson, George L. Becker, William G. Moorhead, the Stillwater and Saint Paul Railroad Company, Samuel M. Felton, the Northern Pacific Railroad Company, Jay Cooke, J. Edgar Thompson, and first division of the Saint Paul & Pacific Railroad Company, defendants.

This defendant, the Saint Paul & Pacific Railroad Company, by protestation, not confessing or acknowledging any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer sheweth:

That the said complainants have not in and by their said bill made or stated such a case as does or ought to entitle them to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

Wherefore this defendant demands the judgment of this honorable court whether this defendant shall be compelled to make any other or further answer to the said bill or any of the matters and things
217 therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

JAMES SMITH, JR.,
Solicitor for the Defendant,
the St. Paul and Pacific Railroad Company.

JAS. SMITH, Jr.,
Of Counsel of Defendant.

UNITED STATES OF AMERICA.

Circuit court of the United States in and for the district of Minnesota.

I, James Smith, jr., a resident of St. Paul, in said district, and a counsellor of said court, do hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

JAMES SMITH, JR.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

James Smith, jr., being sworn, deposes and says he is the solicitor of the defendant, the Saint Paul & Pacific Railroad Company; that none of the officers of said defendant, as deponent believes, are now within said district, and that the foregoing demurrer is not interposed for delay.

JAMES SMITH, JR.

Subscribed and sworn to before me this June 10, 1873.
[NOTARIAL SEAL.] W. S. WILSON,
Notary Public, Ramsey County, Minnesota.

218 On the back of which demurrer is indorsed the following stipulation:

It is stipulated that this demurrer may be filed and the cause as to this defendant placed on the calendar and set down for argument at the next June T., 1873, to wit, June 16, 1873.

MASTERSON & SIMONS,
Sols. for Compts.
JAS. SMITH, JR.,
Sol. for Deft.

And on the same day came the defendants Jay Cooke and J. Edgar Thompson, by Jas. Smith, jr., their solicitor, and filed in the clerk's office of said court their demurrer to the plaintiff's bill of complaint, in writing, and in the words and figures following, viz:

UNITED STATES OF AMERICA:

Circuit court of the United States in and for the district of Minnesota.
In equity.

The joint and several demurrer of Jay Cooke and J. Edgar Thompson, defendants, to the bill of compla'nt of Elon Farnsworth and Edward P. Cowles, complainants, against the Minnesota & Pacific Railroad Company, the Saint Paul & Pacific Railroad Company, Edmund Rice, Horace Thompson, George L. Becker, William G. Moorhead,
219 the Stillwater & St. Paul Railroad Company, Samuel M. Felton, Northern Pacific Railroad Company, and these defendants, Jay Cooke and J. Edgar Thompson.

These defendants, Jay Cooke and J. Edgar Thompson, jointly, and each for himself, severally, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same is therein set forth and alleged, do demur thereto, and, for cause of demurrer, show that said complainants have not, in and by their said bill, made, or stated, such a cause as does or ought to entitle them to any such or any discovery or relief as is thereby sought and prayed for, in manner or form, against these defendants or either of them.

Wherefore these defendants demand the judgment of this hon. court whether these defendants shall be compelled to make any other or further answer to the said bill, or to any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

JAMES SMITH, JR.,
Solicitor for said Defts. Cooke & Thompson.

JAS. SMITH, Jr.,
Of Counsel for Defts.

UNITED STATES OF AMERICA:

Circuit court of the United States, district of Minnesota.

220 I, James Smith, jr., of Saint Paul, in said district, and a counsellor of said court, do hereby certify that, in my opinion, the foregoing demurrer is well taken in point of law.

JAMES SMITH, JR.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

James Jmith, jr., of Saint Paul, in said district, being first duly sworn, deposes that he is the authorized agent and solicitor of the above-named defendants, Jay Cooke and J. Edgar Thompson, in the action and proceeding above entitled; that said defendants are not, nor is either of them, within said district, and that, to deponent's knowledge, the foregoing demurrer is in good faith, and not interposed for delay.

JAMES SMITH, JR.

Subscribed and sworn to before me this 10th day of June, 1873.
[NOTARIAL SEAL.] W. S. WILSON.
Notary Public, Ramsey County, Minn.

Upon which said demurrer is indorsed the following stipulation:

It is stipulated that this demurrer be filed without objection, and that the cause be entered in the calendar and set down for argument at the next June T., 1873.

MASTERSON & SIMONS,
Sol. for Complainants.
JAS. SMITH, JR.,
Sol. for Defts.

221 And on the same day came the defendant, the Stillwater and Saint Paul Railroad Company, by James Smith, jr., esq., its solicitor, and filed in the clerk's office of said court its demurrer to the plaintiff's bill of complainant, in writing, and in the words and figures following, viz:

UNITED STATES OF AMERICA,
Circuit Court of the United States, District of Minnesota, ss:

Demurrer of the Stillwater & St. Paul Railroad Company, defendant, to the bill of complaint of Elon Farnsworth and Edward P. Cowles, complainants, against the Minnesota & Pacific Railroad Company, the Saint Paul & Pacific Railroad Company, Edmund Rice, George L. Becker, Horace Thompson, William G. Moorhead, Samuel M. Felton, the Northern Pacific Railroad Company, Jay Cooke, J. Edgar Thompson, and this defendant, the Stillwater and Saint Paul Railroad Company.

This defendant, the Stillwater and St. Paul Railroad Company, not confessing or acknowledging all or any of the matters and things in the complainant's bill alleged to be true in such manner and form as the same are therein set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainants have not, in or by their said bill, made or stated such a case as doth or ought to entitle them to any such discovery or relief as is thereby sought and
222 prayed for from or against this defendant.

Wherefore this defendant demands the judgment of this hon. court whether this defendant shall be compelled to make any other or further answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

JAS. SMITH, JR.,
Sol. for Deft. S. & St. P. Railroad Co.

JAS. SMITH, JR.,
Of Counsel for Deft.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I, James Smith, jr., a counselor of this court, do hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

JAMES SMITH, JR.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

Thomas M. Davis, of St. Paul, in said district, being duly sworn, says that he is the treasurer of the Stillwater and Saint Paul Railroad Company named in the foregoing demurrer, and that the said demurrer is not interposed for delay.

THOS. M. DAVIS.

Subscribed & sworn to before me this 10th day of June, 1873.

223 [NOTARIAL SEAL.] W. S. WILSON,
Notary Public, Ramsey Co., Minn.

Upon which demurrer is indorsed the following stipulation, viz:

It is hereby stipulated that this demurrer may be filed, and the cause as to this defendant placed on the calendar for argument at next June term, 1873, to wit, June 16, 1873.

MASTERSON & SIMONS,
Sol. for Complainants.
JAMES SMITH, JR.,
Sol. for Defendants.

And on the same day came the defendants William G. Moorhead and Samuel M. Felton, by James Smith, jr., esq., their solicitor, and filed in the clerk's office of said court their demurrer, in writing, to the plaintiff's bill of complaint, and in the words and figures following, to wit:

UNITED STATES OF AMERICA:

Circuit court of the United States in and for the district of Minnesota.
In equity.

The joint and several demurrers of William G. Moorhead and Samuel M. Felton, defendants, to the bill of complaint of Elon Farns-
224 worth and Edward P. Cowles, complainants, against the Minnesota & Pacific Railroad Company, the Saint Paul & Pacific Railroad Company, Edmund Rice, Horace Thompson, George L. Becker, the Stillwater and St. Paul Railroad Company, Northern Pacific Railroad Company, Jay Cooke, J. Edgar Thompson, and these defendants, William G. Moorhead and Samuel M. Felton.

The defendants, William G. Moorhead and Samuel M. Felton, jointly and severally, by protestation, not confessing or acknowledging all or any of the matters in the said bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show that the said bill of complaint does not state, and the complainants have not in and by said bill made or stated such a case as does or ought to entitle them to any such or any discovery or relief as is thereby sought and prayed for in manner and form against these defendants or either of them.

Wherefore these defendants demand the judgment of this honorable

court whether these defendants or either of them shall be compelled to make any other or further answer to the said bill or to any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs.

JAMES SMITH, JR.,
Solicitor for sd. Defts. Moorhead & Felton.

JAMES SMITH, Jr.,
Of Counsel for Defts.

225 UNITED STATES OF AMERICA,
Circuit Court of the United States, District of Minnesota, ss:

I, James Smith, jr., of St. Paul, in said district, a counsellor of said court, do hereby certify that, in my opinion, the foregoing demurrer is well taken in point of law.

JAMES SMITH, JR.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

James Smith, jr., of Saint Paul, in said district, being sworn, deposes that he is the duly-authorized agent and attorney of the defendants, Wm. G. Moorhead and Samuel M. Felton, in the action and proceedings above entitled; that said defendants are not nor is either of them within said district, and that to deponent's own knowledge the foregoing demurrer is in good faith and not interposed for delay.

JAMES SMITH, JR.

Subscribed and sworn to before me June 10, 1873.
[NOTARIAL SEAL.]
W. S. WILSON,
Notary Public, Ramsey Co., Minn.

On the back of which demurrer is indorsed the following stipulation:

226 It is hereby stipulated that this demurrer may be filed, and this cause as to these defendants placed on the calendar for argument at next June term, 1873, to wit, June 16, 1873.

MASTERSON & SIMONS,
Solrs. for Complainants.
JAS. SMITH, JR.,
Sol. for Defts.

And afterwards, at rules, in the clerk's office of said court, to wit, on the 12th day of June, A. D. 1873, the following, among other proceedings, was had:

ELON FARNSWORTH AND EDWARD P. COWLES, trustees, &c.,
vs.
THE MINNESOTA & PACIFIC RAILROAD COMPANY and others.

And now come the plaintiffs, by Messrs. Masterson & Simons, their solicitors, on whose motion, and the stipulation of the parties thereto, ordered that the demurrers of the defendants, the Stillwater & Saint Paul Railroad Company, Wm. G. Moorhead, and Samuel M. Felton, the Saint Paul & Pacific Railroad Company, Jay Cooke, and J. Edgar Thompson, be, and the same are, set down for hearing at the next gen-

eral term of this court, to be held on the 16th day of June, A. D. 1873, at the opening of court on that day or as soon thereafter as counsel can be heard.

227 And afterwards, to wit, at the June term of said court, A. D. 1873, and on the 30th day of June, A. D. 1873, the following proceeding, among others, was had, viz:

ELON FARNSWORTH ET AL., TRUSTEES, &C.,
vs.
THE MINNESOTA AND PACIFIC RAILROAD COMPANY ET AL.

The demurrers of the defendants to the plaintiff's bill of complaint coming on to be heard, was argued by counsel, his honor Judge Dillon sitting alone. H. R. Bigelow, esq., C. K. Davis, esq., and James Smith, jr., esq., in favor of the demurrers, and H. F. Masterson, esq., in opposition thereto.

And afterwards, at said June term of said court, and on the first day of July, A. D. 1873, the following proceeding, among others, was had, viz:

ELON FARNSWORTH ET AL., TRUSTEES, &C.,
vs.
THE MINNESOTA & PACIFIC RAILROAD COMPANY ET AL.

Before Hon. John F. Dillon, judge, sitting alone.

This cause came on to be further heard, and was further argued by counsel and submitted to the court, and by the court held under advisement.

And afterwards, to wit, at the December term of said court, A. D. 1873, the opinion of said court was delivered in said cause, which
228 opinion is in writing and in the words and figures following, to wit:

229 In U. S. circuit court, district of Minnesota, December term, 1873.

ELON FARNSWORTH AND EDWARD P. COWLES, trustees, &c.,
vs.
THE MINNESOTA AND PACIFIC RAIROAD COMPANY ET AL.

1. The grant of lands by Congress to the Territory of Minnesota to aid in the construction of railroads therein (U. S. Stats. at Large, 195) gave to the Territory the legal title, but in strict trust, and the Territory or State could dispose of said lands only in the manner and for the purposes for which they were granted.

2. Except as to the first 120 sections, the right to the lands and to a title thereto only arises or can become perfect when the road or a section of 20 continuous miles is completed, and until the road is thus completed the State cannot part with the title to the lands, and its

grantee cannot sell or mortgage such lands in advance of the construction of the road, so as to give a title thereto or a lien thereon, as against the State, or a subsequent grantee who actually builds the road and earns the lands.

230 3. The amendment to the constitution of Minnesota of April 15, 1858, providing for the issue of State bonds to the land-grant railroad companies on specified terms and conditions construed, and the nature of the remedies of the State for the default of the companies by foreclosure and forfeiture considered, and it was held that the right of the old companies to the land-grant and to the franchises connected therewith, necessary to make the grant available for the use intended, was forfeited to the State, and that a mortgage made thereon by the old companies was subject to this forfeiture, and could not be enforced as a lien on the said lands and franchises in the hands of the new companies (subsequent grantees of the State) which afterwards built the roads and earned the lands.

Before DILLON, circuit judge.

Railroad grant to Minnesota.—Power of State to dispose of the grant.—Railroad-aid amendment to the State constitution.—Foreclosure and forfeiture thereunder.—Rights of old and new railroad companies as respects the land-grant and franchises.

This is a bill in equity to foreclose a deed of trust executed by the Minnesota and Pacific Railroad Company, dated July 31, 1858, purporting to secure bonds of the company to the amount of $23,000,000;

231 but the amount of $900,000 only were issued, which were delivered by the company at various times between the 28th day of September, 1858, and November 15, 1859. The plaintiffs are the surviving trustees named in said deed of trust of July 31, 1858. This deed of trust was executed under the authority conferred upon the company by the 21 section of its constituent act or charter, the act of the territorial assembly of May 22, 1857, hereinafter referred to. The bill, which is drawn with marked skill and care, gives at length the various statutes of Congress and of the Territory and State of Minnesota applicable to the controversy to which it relates, and covers 188 printed pages.

The defendants to the bill are the above-mentioned Minnesota and Pacific Railroad Company, also the Saint Paul and Pacific Railroad Company, (created by the act of March 10, 1862, hereafter referred to,) the first division of the St. Paul and Pacific Railroad Company, the Stillwater and St. Paul Railroad Company, and various trustees for bondholders in mortgages made by some of these last-named companies on lands and franchises, which the plaintiffs claim are subject to the lien of their deed of trust of July 31, 1858.

The relief prayed for is that this deed of trust be declared valid, and a lien upon all the property, lands, &c., prior to the liens and rights of any of the other companies made defendants; that an account be

232 taken of the amount due on the deed of trust; that the other companies defendants be severally required to render an account of all property, &c., covered by the plaintiff's trust-deed, or the proceeds thereof, and decreed to pay the same over, &c., and in default to do so, that the plaintiffs be let into possession; that the plaintiffs may have a decree for the sale of the railroads and property covered by the deed of trust sought to be foreclosed, and for general relief.

The defendants severally demur to the bill, and it is on these demurrers that the cause is now before the court. The questions made will

be understood by the following statement of the facts, as shown by the bill, and the various statues and instruments referred to therein:

On the 3d day of March, 1857, the Territory of Minnesota received, by act of Congress, a grant of lands to aid in the construction of certain railroads. In April of that year an extra session of the legislature was convened to provide for their early construction. On May 22 it passed an act to that end. (Laws of 1857, p. 14.) This act authorized four different companies to construct, in several portions, all the roads in aid of which Congress had granted the lands, and made over to each the part of the lands pertaining to the lines of road to be by it constructed. Three of these companies, the Transit, the Root River Valley and Southern Minnesota, and the Minneapolis and Cedar Valley—had been
233 incorporated and organized in previous years to construct lines of railroads other than those aided by the congressional grant. The act of May 22 left them all their original powers, and added thereto the right of each company to construct a specified portion of the lines in aid of which the grant was made. The other company, the Minnesota and Pacific, was incorporated by chapter 1 of the said act of May 22, 1857, which is its only charter, and was thereby authorized to construct a portion of the lines aided by the land-grant, and also other lines of road hundreds of miles in length not so aided. So each company was a corporation for the purpose of constructing other lines of road besides those in aid of which the lands were granted, and which at that time, and for long afterwards, were without aid or bonus of any kind. Each company had in its charter-authority to borrow money, and for security to mortgage said lands and its roads, or any part thereof, in advance of its construction, together with the franchises pertaining to the part mortgaged, and was "also empowered and authorized, in and by such mortgage or deed of trust, to confer on the trustee or mortgagee full and ample powers to enter into and upon, and to take possession of, have, use, and employ, or to sell or dispose of, the whole or any part of said railroad and branches."

234 All the companies commenced work, but were soon met by the financial crash of that year. The lands, being liable to revert to the United States if the roads were not completed within a certain time, were not, in the then condition of financial affairs, a sufficient or available basis of credit upon which to borrow money. They had to suspend work.

The Territory had mean time become a State, with a constitution which forbade the creation of a State debt or the use of the State credit for such purpose. The legislature met, and, to expedite the construction of the land-grant railroads, in March, 1858, proposed an amendment to the constitution. It was adopted April 15, by an almost unanimous vote of the people.

This amendment provided for "a loan of the credit of the State" to the four land-grant companies "for the purpose of expediting the lines of said road in aid of which the Congress of the United States had granted lands," to the amount of $1,250,000 to each, $5,000,000 in all, in the following manner and form: The governor was to cause to be issued and delivered to each company the special bonds of the State, in installments of $100,000, as often as any ten miles of its road was made ready for placing the superstructure thereon, until one hundred and twenty-
235 five miles had been so constructed, or, at the option of the company, it was to receive double that amount for road fully completed and the cars running thereon; that is to say, the several companies could, at their option, either receive the whole $1,250,000 for one

hundred and twenty-five miles of road-bed graded and made ready for the superstructure, or the same amount for sixty-two and one-half miles completed, with the cars running thereon.

These bonds were bonds of the State under its seal, but were not, as is usual, payable to bearer, but to the order of the company to which they were issued, and transferable only by its indorsement. And such company was required by the constitutional amendment to make provision (how was not specified) for the payment of principal and interest in such a manner as to exonerate the treasury of the State from any advance for such purpose.

Thus these State bonds, when read with the constitutional amendment as being a part of the contract, created no debt or obligation from the State to the companies. A negotiable class of evidences of debt was provided, in which the nominal payee had no claim against the maker and nominal payor. The bonds were without obligatory force until indorsed by the company and transferred to others.

236 In consideration of such loan of the credit of the State, the company was required by the constitutional amendment *required* to give to the governor, first, an instrument pledging the net profits of its road for the payment of the interest on said bonds; second, a conveyance of the first two hundred and forty sections of land which the company was authorized to sell; third, "and as a further security, an amount of the first-mortgage bonds on the roads, lands, and franchises of the company, corresponding (in amount) to the State bonds issued to it." These bonds of the companies were to be transferred to the treasurer of the State, whereas the other securities were given to and held by the governor.

This exchange of bonds was the form devised to give the companies the united strength of the credit of the State combined with their own.

For remedy in case either company made default in the payment of the principal or interest of the State bonds issued to it, the further provision of the constitutional amendment was that the governor might sell, in such manner as should be prescribed by law, the bonds of the company which were transferred to the treasurer, or the said 240 sections of land, or he "might require a foreclosure of the mortgage executed to secure the bonds of the company."

237 In case of failure of any company to complete fifty miles of its road prior to January 1st, 1862, (and other portions at subsequent times,) the constitutional amendment provided that such failure was a cause of forfeiture to the State of "all the rights, title, and interest in and to any lands" vested in said company by the act of May 22, 1857, "together with the franchises connected with the same and pertaining or applicable to the portion of the road by it constructed."

Within thirty days after the governor's proclamation "that the people have voted for a loan of State credit for railroads," (the form in which the adoption of the amendment was put,) any of said companies proposing to avail themselves of the loan, and to accept the conditions of the same, were required to notify the governor thereof and to commence work in sixty days. They all did this, and thereby this constitutional amendment became, as the companies claim, a contract, as well as part of the fundamental law of the State.

The Minnesota and Pacific Company, (which is the one whose subsequent history is material to this case,) on the 31st day of July, A. D. 1858, executed, under its corporate seal, and delivered to the trustees therein named, a conveyance of all that portion of its lines of road and

the lands and "alienable" franchises connected therewith or relating thereto described in the 2nd section of its charter, being those in aid of which lands had been granted, but not including those portions not so aided, and which are described in the 25th section of its charter.
238 This conveyance was in trust for all the holders, present and prospective, of the $23,000,000 of its first-mortgage bonds to be issued under certain restrictions. In conformity with the 21st section of its charter, which was the authority for such trust-deed, it conferred upon the trustees, and them alone, a power of sale of the trust-property in case of default.

At or about the same time, and bearing the same date, nine hundred of such bonds were executed by the company and countersigned and registered by the trustees, and some of them put in circulation.

The company having graded thirty miles of road and made it ready for the superstructure, and having executed and delivered the instrument pledging net profits, &c., and the conveyance of the first 240 sections of land as specified in the said amendment, and transferred to the treasurer of the State $300,000 of its first-mortgage bonds secured by said trust-deed, and filed such deed with the secretary of state, it applied to the governor for $300,000 of said State bonds.

The governor refused, and "insisted on a deposit of first-mortgage bonds of the companies made to the State, based upon the deed of trust to the State, equal in amount to the State bonds issued to such companies, which deed of trust should specify a priority of lien to such bonds as the companies might deliver to the State in exchange for the bonds." On the other hand, the company denied that the State
239 was entitled to any preference as to these securities, and insisted that the trust-deed, as it stood, and which confined the power of sale or foreclosure by advertisement to the trustees alone, and that the bonds secured by it were a full compliance with the constitutional amendment. The company had then already disposed of some of the same series of bonds upon its theory of the law.

The governor consented to waive his right to the jurisdiction of the courts over his official action in the matter, and to co-operate with the company to procure at the earliest time the judgment of the supreme court upon the question.

A special term of the supreme court was convened November 8, 1858, and an application made to it for a mandamus to compel the governor to deliver the bonds of the State, as demanded by the company, upon the security of the said trust-deed, which gave the State no priority or preference, and under which a foreclosure could be made only by the trustees or by decree of court. The governor appeared and submitted the question in dispute to the decision of the court. It decided Nov. 10, 1858, (2 Minn., 19–21,) that he was wrong; that the trust-deed was sufficient; that the intention of the makers of the constitution was "to provide the State with an exclusive lien on the net profits of the road and the control of the first two hundred and forty sections of land, and to place her on an equal footing only with other creditors as to the
240 bonds received from the companies;" that "the constitutional amendment was framed with direct reference to the mode of raising money provided for in the charters of the companies," citing the said 21st section of the charter of the Minnesota and Pacific, which limits the exercise of the power of foreclosure by advertisement and sale to the trustee or mortgagee. And the peremptory mandamus was awarded.

The governor thought the supreme court gave an erroneous decision,

and that it was mistaken in the construction it gave to the constitution; and, falling back upon his exemption from judicial control, he refused obedience to the mandamus until the company executed the supplement to said deed of trust and authorized him in a certain contingency to sell all the trust-property upon this advertisement without the co-operation or consent of the other creditors under the trust-deed, and which supplement is the only authority or foundation for the sale afterwards made by his successor.

He further ensisted—"imposed terms" was his language—that the company should formally accept his "ruling," "by which only $625,000 of the State aid was to be applied to the grading of their roads, and the remaining $625,000 to be delivered only as the roads were completed and cars running thereon." The company yielded.

The Minnesota and Pacific Company struggled along, and before the expiration of 1859 had, it is alleged, graded and made ready for the iron sixty-two and one-half miles.

241 By the trust-deed the interest on the bonds of the company was payable on the 1st days of Feb. and Aug., and the bonds transferred to the treasurer of the State agreed with the deed, while the interest on the State bonds delivered to the company was payable on the first days of Dec. and June. The act of Aug. 12, 1858, required the companies to make the interest upon their bonds payable sixty days before that upon the State bonds. But that act was passed twelve days after the trust-deed was executed and delivered, but before any of the bonds secured thereby were delivered. And the State afterwards made the interest on her bonds payable sixty days before instead of sixty days after that on the company's bonds.

The company made default in the payment of the interest on the State bonds delivered to it which became due Dec. 1, 1859, and the governor for that reason demanded of the trustees that they should sell the trust property at once.

A subsequent default of the company to pay the interest on the State bonds is alleged, but no subsequent demand on the trustees to foreclose. In March, 1860, the legislature passed two acts, one directing the gove'nor to foreclose and the other proposing an amendment to the constitution. The first act directed the gove'nor to bid off the property, (without limit as to price,) but did not make, nor was any appropriation of money made by any act to pay what he might bid; no provision

242 was made for an offset of the sum which the State had paid or become liable to pay, if either had been the fact, as or for the payment of the gove'nor's bid. On the contrary, the other acts referred to, and passed by this same legislature about the same time, (March 10,) proposed an amendment of the constitution so that "no law levying a tax or making other provisions for the payment of interest or principal of these bonds should take effect or be in force until such law should have been submitted to a vote of the people and adopted by a majority." The same act proposed that the constitution should be further amended as follows: "Section 10. The credit of the State shall never be given or loaned in aid of any individual, association, or corporation, nor shall there be any further issue of bonds denominated Minnesota State railroad bonds under what purports to be an amendment to section ten, article nine, of the constitution, adopted April 15, eighteen hundred and fifty-eight, which is hereby expunged from the constitution, saving, excepting, and reserving to the State, nevertheless, all rights, remedies, and forfeitures accruing under said amendment."

This amendment was adopted by the people as unanimously as the amendment which is "expun ged."

The gove'nor, on authority of the above-cited acts and the supplement to the trust-deed above referred to and the said demand on the trustees made by his predecessor, proceeded to make a sale or foreclosure,
243 and to bid the lands, roads, property, and franchises off for and in the name of the State for $1,000, but did not, and for want of an appropriation could not, pay the said bid, nor one cent of it.

Pending the gove'nor's advertisement of sale, James M. Winslow, a creditor of the company, and a holder of some of the same series of bonds, brought action in the district court for Ramsey County to enjoin such sale and to set aside and annul the said supplement to the trust-deed. He made the railroad company, the trustees, and the gove'nor defendants. Afterwards, by leave of court, Sanborn & Lund, bondholders, who asked that the sale and supplement might be upheld, were allowed to come in and defend.

The result was a judgment or decree declaring the said supplement null and void, and adjudging that it be cancelled and that the sale made by virtue of it be set aside.

The opinion of the court was filed February 25, 1861, while the legislature was in session. In this condition of things the legislature passed the act of March 8, 1861, by which all that the State acquired at the sale (if anything) was, upon certain conditions, "released, discharged, and restored to the said company, free of all liens or claims thereon held by or on behalf of the State."

One of the conditions was as follows:

"SEC. 3. The said company shall, as a further consideration of this
244 act, construct and put in operation, and fully equip for business, that portion of the main line extending from St. Paul to St. Anthony on or before the first day of January next, in default of which all the rights and benefits conferred upon said company by virtue of this act shall be forfeited to the State absolutely, and without further act or ceremony whatever; and in case the said company shall fail to construct the other and further portions of said road and branches, as aforesaid, at the time or times aforesaid, the said company shall forfeit to the State absolutely, and without any other act or ceremony whatever, all the lands, property, and franchises pertaining to the unbuilt portions of said road and branch, and in either case, or in any forfeiture whatever under the provisions of this act, the State shall hold and be possessed of all such lands, property, and franchises so forfeited, without merger or extinguishment, to be used, granted, or disposed of for the purpose of aiding and facilitating the construction of said road and branch."

The company did some work, but failed to complete the road to St. Anthony by January 1, 1862, and the legislature, acting upon such forfeiture therefor, passed the act of March 10, 1862, entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad Company, and to amend and continue the act of incorporation relating
245 thereto."

The act of March 10, 1862, constitutes the charter of the Saint Paul and Pacific Company, and under it this last-named company and the 1st division company (created out of it by a subsequent act, February 6, 1864, of the legislature) have since then and before this bill was filed completed the main line ot road to Breckenridge, and a portion of the branch line, and deeds of trust and mortgages for many millions of dollars have been executed and are outstanding. (See Kennedy v. St. Paul & Pacific R. R. Co., 2 Dillon, C. C. R.. 448.)

All this has had its foundation in the act of March 10, 1862, which

granted or undertook to grant to the Saint Paul and Pacific Company "all the rights, privileges, franchises, lands, property, and interests granted by the Territory of Minnesota to the Minnesota and Pacific Railroad Company by the act of May 22, 1857, * * free and clear of all claim and liens thereon, and free from all liens and claims of the State of Minnesota against the same, except such as are retained by this act."

The leading questions raised by the demurrers to the bill and argued by counsel, are as to the right to make the mortgage or deed of trust of July 31, 1858, or rather as to the right to include therein and bind thereby the lands granted by the act of Congress of March 3, 1857, to the Territory of Minnesota to aid in the construction of the line
246 of railroad in controversy. If such lands may be granted or mortgaged in advance of the construction of the roads, then *as* the power of the State to use and apply such lands to secure the building of the road in case the company to which the State first granted them failed to build the road as required by the constitutional provision and legislation of the State.

Another question arising under the amendment of April 15, 1858, to the constitution of the State, providing for the loan of State credit to the land-grant roads, is as to the effect on the trust-deed to the plaintiffs, of July 31, 1858, of the forfeiture provided for in the above-mentioned constitutional amendment.

Another question also arising under the constitutional amendment and legislation of the State, is as to the effect on the trust-deed to the plaintiffs of the foreclosure by the State under the supplemental deed of trust of November 27, 1858, and also as to the effect of the Winslow decree, cancelling the said supplemental deed of trust and the sale thereunder.

MASTERSON & SIMONS,
For the Complainants.
BIGELOW, FLANDRAU & CLARK,
JAMES SMITH,
C. K. DAVIS,
For the Defendants.

247 DILLON, *Circuit Judge:*

On March 3d, 1857, Congress made a grant of lands to the Territory of Minnesota, to aid in the construction of certain lines of railroads therein, (11 Stats. at Large, 195.) To construct one of these roads, the legislature of Minnesota created a corporation styled Minnesota and Pacific Railroad Company, by an act approved May 22, 1857. (Laws of Min., extra session, 3.) And by the same act this corporation, as respects its line, was made the grantee or beneficiary of the land-grant of the General Government. Indeed, the legislature, by this act, in terms granted to the company, to aid in the construction of its road, "all the interest and estate, present and prospective, of the Territory and of the future State, in or to any or all lands granted by the Government of the United States to the Territory of Minnesota, to aid in the construction" of said line of railroad.

By the same act, the company was authorized to execute one or more mortgages or deeds of trust upon the whole or any part of its railroad or branches, and upon the estate granted by this act, and all other estate, including all corporate and other franchises, rights, and privileges. (Sec. 21.)

On the 15th day of April, 1858, the constitutional amendment

248 was adopted, making provision for extending State credit to the land-grant railroads, including the Minnesota and Pacific Railroad. The provisions of this amendment were accepted by the company, and so they became applicable to it.

Afterwards, on the 31st day of July, 1858, pursuant to the power given in its charter above referred to, the Minnesota and Pacific Railroad Company made the deed of trust of that date, now sought to be foreclosed by the plaintiffs, who are the surviving trustees named therein.

This instrument does not cover all the lines of road the company were authorized to construct, but only those portions of its line in aid of which lands had been granted by the above-mentioned act of Congress of March 3, 1857, and as to the portion last mentioned, it grants to the trustees the entire railroad and the lands and alienable franchises of the company, and particularly all the lands granted by Congress to aid in the construction of the road, supposed to contain 2,467,600 acres.

The company never completed any portion of the road, and for its default in this respect the bill gives various reasons, such as the financial reverse in 1857 and the failure of the State faithfully to observe the compact contained in the constitutional amendment of April 15,
249 1858. The State, claiming that the company was in fault, foreclosed or attempted to foreclose its supplemental deed of trust. This was in 1860. In 1861 the State restored all rights thus acquired on certain conditions, which the company failed to perform, and on March 10, 1862, it created the St. Paul and Pacific Company, (2 Dillon, C. C. R., 396,) and granted to it "all the rights, benefits, privileges, property, franchises, and interests of the Minnesota and Pacific Railroad Company acquired by the State of Minnesota by virtue of any acts, deeds, agreement, or thing by the said company heretofore done or suffered, or by virtue of any law of the State or the constitution thereof, or by reason of any sale thereof by the governor of the State on the 23d day of June, 1860, free and clear of all claims or liens thereon, and from all liens or claims by or to the State of Minnesota." And the legislature, by the said act, gives to the new company the benefit of the land-grant of Congress of March 3, 1857.

The new companies have constructed the roads as far as built, and, to enable them to do so, have made various deeds of trust and mortgages, upon the assumption that the rights of the old Minnesota and Pacific Railroad Company no longer existed. (See Kennedy vs. St. Paul & Pacific Railroad Company, 2 Dillon, C. C. R., 448.)

The bill claims, inter alia, that the deed of trust made by the
250 Minnesota & Pacific R. R. Co., on the 31st day of July, 1858, is a lien upon the lands granted by Congress to aid in the construction of this line of road. This claim is, of course, resisted by the Saint Paul and Pacific Company, and the holders of its bonds, and by the other railroad companies defendant, and this presents the first question to which I shall direct attention.

The decision of this question depends upon the true construction of the act of Congress of March 3, 1857, granting the lands. (11 Stats. at Large, 195.) This act gives the lands to the Territory by words of present grant, but it provides that the lands shall "be exclusively applied in the construction of the road for and on account of which such lands are granted, and shall be disposed of only as the work progresses, and applied to no other purpose whatsoever." (Sec. 1.) And the further express provision of the act of Congress is that the lands granted "shall be disposed of by the Territory or future State only in the manner following: A quantity of land not exceeding 120 sections

for each of said roads and branches * * may be sold, and when 20 continuous miles of any of said roads or branches are completed, then another quantity of land hereby granted, not to exceed 120 sections, * * may be sold; and so from time to time until said roads and
251 branches are completed. If not completed within ten years, no further sale shall be made, and said lands unsold shall revert to the United States." (Sec. 4.) This court has before had occasion to consider the meaning of these provisions. (Harriman vs. Schulenberg, 2 Dillon, C. C. R., 398; Chamberlan vs. St. Paul, &c., Co., at present term.)

My opinion is that the legal title to the lands is in the Territory or State, but in strict trust, and with express restrictions on the power of sale, which is the "only manner" which the act of Congress allows the lands to be "disposed of by the State." And, excepting it may be the first 120 sections, no sale of these lands can be made which shall confer a title on the grantee in advance of the actual construction of the road in sections of twenty continuous miles. By this wise restriction the lands are earned, and the title can be acquired by the companies only by the actual completion of the line of road in sections of twenty, subsequently reduced to ten, miles; and thus it is rendered impossible to waste the lands or dissipate the grant without obtaining the road in aid of which the lands were donated.

As the Minnesota and Pacific Company never completed any road, they never became entitled to any lands, and the mortgage by that company of these lands in advance of the construction of the road
252 was not, as respects such lands, operative when made, and never became so by the subsequent completion of the road by the company.

The title to the lands never passed to the Minnesota & Pacific Railroad Company, for the State could not part with the title before the road was built, (Harriman v. Schulenburg, supra,) and hence this company could not make a mortgage of the lands which would be binding and effectual, if the company did not afterwards acquire the title or the right to it by completing the road, or the section of it to which the lands appertained. To hold that the State could part with the title in anticipation of construction, and that the company could sell or mortgage the lands so as to give its grantee or mortgagee the right to claim the lands as against the subsequent grantee of the State, who should earn them by actually building and completing the road, would be to disregard the restrictions upon the disposition of the lands so carefully and considerately provided in the act of Congress making the grant.

Under this view the State could not effectually part with the title to any of these lands, before the road, or some section of it, was completed; and if it undertook to do so by the act of May 22, 1857, in favor
253 of the Minnesota and Pacific Railroad Company, it transcended its rightful power. And as this company did not complete the road, and the State, in consequence of its failure, subsequently regranted the lands to another company which earned them by building the road, I hold, under these circumstances, that the mortgage of these lands by the old company, now sought to be foreclosed, is no lien upon the lands in the hands of the present companies.

But, suppose I am mistaken in this view, the same result, in my opinion, is reached by reason of the effect of the forfeiture provided for in the constitutional amendment and the acts of the legislature of March 8, 1861, and particularly of March 10, 1862, which last-named act clearly

evinces the legislative purpose to enforce the forfeiture. The forfeiture provided in the act of 1861, being subsequent to the plaintiffs' mortgage, might not affect, and, so far as the forfeiture was for the first time provided for by that act, would not, I think, affect the rights of the bondholders secured by the prior mortgage to the plaintiffs. But the forfeiture' provided for in the constitutional amendment (the provisions of which had been accepted by the company) are older than the plaintiffs' mortgage, and underlie the rights of the creditors secured by it.

254 The constitutional amendment gives the State two remedies; one, by foreclosure and sale of property, to indemnify the State in respect to State bonds issued to the companies; and one, by forfeiture, intended to insure the completion of the roads within the periods therein limited. Now, not less than fifty miles of the road were to be completed by such company before the expiration of the year 1861. This was not done by the Minnesota and Pacific Company, and the failure continued and existed when the act of March 10, 1862, was passed. The constitutional amendment declares the effect of such failure to be "to forfeit to the State all the right, title, and interest of such company of any kind whatsoever, in and to any lands and franchises connected with the same, not pertaining to, or applicable to, the portion of the road by it constructed, and a fee-simple of which has not accrued to the company by reason of such construction, which was granted to the company thus failing to comply with the provisions hereof by act of the legislature of the Territory of Minnesota (May 22, 1857) vesting said lands in said company."

If any section had been built in time, and the lands therefor earned, the forfeiture for subsequent defaults would not extend to that

255 portion, but only to the portion remaining. But if no part of the road should be built within the prescribed time, then the company thus failing forfeited all right to the land-grant of the General Government, and to all franchises connected with the lands conferred upon the companies by the act of May 22, 1857. The object of this provision was to enable the State, in case of a failure by the company to build the road in time, to have control of the lands and franchises, in order that it might take the necessary steps to prevent the land-grant of the General Government from lapsing, and thereby to secure for its people the completion of the roads.

Although the conduct of the State towards the land-grant companies, as set forth in the bill, may be open to some objection for unfairness, yet, upon the whole, I am inclined to think that, as its object in passing the act of March 10, 1862, was not questioned until after vast sums of money had been invested by innocent persons on the faith of that legislation, and the roads built by the new companies, the courts ought not to hold the forfeiture to have been unauthorized or ineffectual. And the forfeiture extends not only to the lands, but to the franchises conferred by the act of May 22, 1857, in order to make, and necessary

256 to make, the grant *the grant* of lands available. As the provisions for a forfeiture were in existence anterior to and when the mortgage to the plaintiffs was made, the rights of the bondholders thereunder are subject to the forfeiture.

In this view, it is not essential to consider whether the supplemental deed of trust and the foreclosure and sale by virtue thereof are valid, and, if valid, what is the effect on the foreclosure of the act of March 8, 1861; nor is it essential to consider the effect of the Winslow decree, setting aside the supplemental deed of trust and the sale by the governor. On these questions I have had much difficulty, and I gladly pass

them until their determination becomes absolutely necessary. It is certain that the foreclosure proceedings do not weaken the title nor diminish the rights the present companies or their creditors.

The bill makes the question that, by the true construction of the act of March 10, 1862, the St. Paul & Pacific Company is the same corporation, under a new name, as the Minnesota and Pacific Company, and hence liable on the coupons and bonds in suit. This court has twice held otherwise. (Hopkins vs. St. Paul & Pacific Railroad Co., 2 Dillon, C. C. R., 396.) And such also is the decision of the supreme court of the State. It is not necessary to renew the discussion of the point.

257 For the reasons above stated, my opinion is, that neither the lands nor other property, rights, or franchises, granted to the present companies by the legislation of 1862, and subsequently, are subject to the lien of the deed of trust of 1858 sought to be foreclosed; and therefore the demurrer of each of the defendants to the bill of complaint will be sustained, and the bill dismissed.

NELSON, J., did not sit in the case.

Ordered accordingly.

And afterwards, to wit, at the December term of said court, A. D. 1873, and on the 30th day of January, A. D. 1874, the following proceeding, among others, was had, to wit:

ELON FARNSWORTH AND EDWARD P. COWLES, trustees,
vs.
THE MINNESOTA & PACIFIC RAILROAD COMPANY; the St. Paul & Pacific Railroad Company; the first division of the St. Paul & Pacific Railroad Company; the Stillwater & St. Paul Railroad Company; the Northern Pacific Railroad Company, Edmund Rice, trustee, &c.; Horace Thompson, trustee, &c.; George L. Becker, trustee, &c.; William G. Moorhead, trustee, &c.; Samuel M. Felton, trustee, &c.; J. Cook', trustee, &c.; and
258 J. Edgar Thompson, trustee, &c.

This cause came on to be heard at the June term of this court, 1873, upon the demurrers of the several defendants to the plaintiffs' bill, and was argued by counsel and submitted to the court, and by the court held under advisement. Now, the court being fully advised in the premises, it is by the court ordered, adjudged, and decreed that the said demurrers, and each of them, be, and they hereby are, sustained, and that the plaintiffs' bill be, and the same is hereby, dismissed; and it is further ordered, adjudged, and decreed that the plaintiffs pay to the defendants their costs, to be taxed by the clerk of this court, and that the defendants have execution therefor; whereupon the plaintiffs prayed an appeal from this decree and decision to the Supreme Court of the United States, and it is ordered that such appeal be, and the same is hereby, allowed.

And afterwards, to wit, on the 19th day of February, A. D. 1874, came the said plaintiffs, by their said attorneys, and filed in the clerk's office of said court their bond, on appeal, duly approved, which bond, and the approval thereon indorsed, are in the words and figures following, to wit:

259 Supreme Court of the United States. In equity.

ELON FARNSWORTH AND EDWARD P. COWLES, trustees, &c., appellants,
vs.
THE MINNESOTA & PACIFIC RAILROAD COMPANY; the Saint Paul & Pacific Railroad Company, Edmund Rice & Horace Thompson, trustees, &c.; the first division of the St. Paul & Pacific Railroad Company, George L. Becker, trustee, &c.; William G. Moorhead, trustee, &c.; the Stillwater and St. Paul Railroad Company, Samuel M. Felton, trustee, &c.; the Northern Pacific Railroad Company, Jay Cooke, & J. Edgar Thompson, respondents.

Know all men by these presents that we, William R. Marshall and Wm. L. Banning, both of the city of Saint Paul, in the county of Ramsey, and State of Minnesota, are held and firmly bound unto the Minnesota & Pacific Railroad Company; the Saint Paul & Pacific Railroad Company, Edmund Rice and Horace Thompson, trustees, &c.; the first division of the Saint Paul & Pacific Railroad Company, George L. Becker, trustee, &c.; William G. Moorhead, trustee, &c.; the Stillwater & St. Paul Railroad Company, Samuel M. Felton, trustee, &c.; the Northern Pacific Railroad Company, Jay Cooke and J. Edgar
260 Thompson, the above defendants, in the sum of one thousand dollars, to be paid to the said respondents, their and each of their successors, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this sixteenth day of February, A. D. 1874.

Whereas the above-named appellants, Elon Farnsworth and Edward P. Cowles, have taken an appeal to the Supreme Court of the United States to remove the decree rendered in the above-entitled action by the circuit court of the United States for the district of Minnesota, eighth circuit, on the thirtieth day of January, A. D. 1874: Now, therefore, the condition of this obligation is such, that if the above-named Elon Farnsworth and Edward P. Cowles shall prosecute their said appeal to effect, and answer and pay all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WM. R. MARSHALL. [SEAL.]
W. L. BANNING. [SEAL.]

Sealed and delivered in presence of—
R. F. HOWARD.
FRANK T. MIX.

STATE OF MINNESOTA,
County of Ramsey, ss:

261 William R. Marshall and Wm. L. Banning, both of said county, being each duly sworn, doth each for himself depose and say, that he is one of the sureties named in the foregoing bond, and that he is worth the sum of two thousand dollars, over and above all his just debts

and exclusive of property exempt from execution by the laws of said State.

WM. R. MARSHALL.
W. L. BANNING.

Subscribed and sworn to before me this 19th day of February, A. D. 1874.

[NOTARIAL SEAL.] FRANK T. MIX,
Notary Public, Ramsey County.

I hereby approve of the amount for which the within security is given, and of the sureties therein named.

R. R. NELSON,
U. S. Judge.

262 UNITED STATES OF AMERICA,
Circuit Court of the United States
for the District of Minnesota, ss:

I, H. E. Mann, clerk of said court, do hereby certify, and return to the honorable the Supreme Court of the United States, that the foregoing is a true and complete transcript of the records, process, pleadings, orders, opinion of the court, final decree, and all other proceedings in the foregoing-entitled cause, as appears from the original records and files of said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district aforesaid, this twenty-eighth day of March, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-eighth year.

[SEAL.] H. E. MANN,
Clerk.

(Indorsement on cover:) No. 164. Elon Farnsworth and Edward P. Cowles, appellants, vs. The Minnesota and Pacific Railroad Company; the St. Paul and Pacific Railroad Company; the first division of the St. Paul and Pacific Railroad; the Stillwater and St. Paul Railroad Company; the Northern Pacific Railroad Company; Edmund Rice, trustee, &c.; Horace Thompson, trustee, &c.; George L. Becker, trustee, &c., William G. Moorhead, trustee, &c.; Samuel M. Felton, trustee, &c.; Jay Cooke, trustee, &c.; and J. Edgar Thompson, trustee, &c. Minnesota C. C. U. S. Filed 8th April, 1874.

BRIEF.

SUPREME COURT OF THE UNITED STATES.

No. 164.

OCTOBER TERM, 1875.

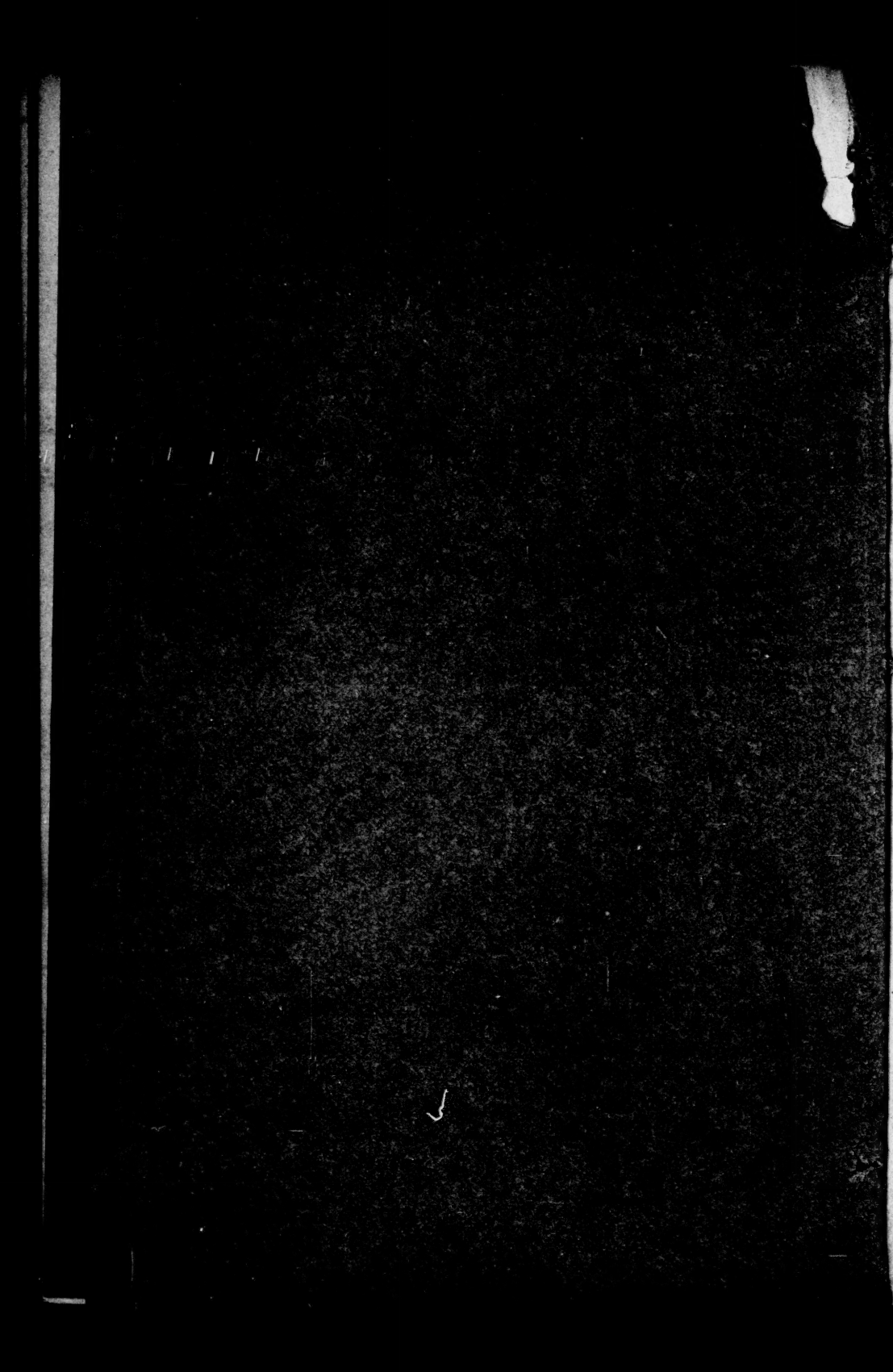
ELON FARNSWORTH AND EDWARD P. COWLES, APPELLANTS,

vs.

THE MINNESOTA AND PACIFIC RAILROAD COMPANY, THE ST. PAUL & PACIFIC RAILROAD COMPANY, THE FIRST DIVISION OF THE ST. PAUL & PACIFIC RAILROAD, THE STILLWATER & ST. PAUL RAILROAD COMPANY, THE NORTHERN PACIFIC RAILROAD COMPANY, EDMUND RICE, TRUSTEE, &C., HORACE THOMPSON, TRUSTEE, &C., GEORGE L. BECKER, TRUSTEE, &C., WILLIAM G. MOORHEAD, TRUSTEE, &C., SAMUEL M. FELTON, TRUSTEE, &C., JAY COOKE, TRUSTEE, &C., AND JAY EDGAR THOMPSON, TRUSTEE, &C.,

Appeal from the Circuit Court of the United States for the District of Minnesota.

HENRY F. MASTERSON,
Counsel for Appellants.



SUPREME COURT

OF THE

UNITED STATES.

No. 164.

OCTOBER TERM, 1875.

ELON FARNSWORTH & EDWARD P. COWLES, *Appellants*,

versus

THE MINNESOTA & PACIFIC RAILROAD COMPANY, THE ST. PAUL & PACIFIC RAILROAD COMPANY, *et als*, *Respondents*.

This is an appeal from the decree of the Circuit Court for the District of Minnesota sustaining the demurrers of the several respondents to the appellants' bill of complaint, and dismissing their [1] bill.*

The bill is brought for the purpose of having it adjudged and decreed that a certain deed of trust therein set forth is a valid and subsisting lien, and the first lien, upon the franchises, railroads and other property and rights therein described and conveyed in trust; and for the aid of the court to enforce such lien.†

The complainants and appellants are the surviving trustees of said deed.‡

The respondents are the makers of the deed, (The Minnesota and Pacific Railroad Company) and numerous other parties, who claim the franchises, railroad and property described in and conveyed by said deed, by titles subsequent to the deed, and with notice of it.§

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* Record, p. 132.

† Record, p. 102, folio 183.

‡ The ~~respondent~~ Cowles died Dec. 3, 1874, which is since the appeal has been pending in this court.

§ Record, pp. 96 7, folios 172 174.

The following is an

ABSTRACT OF THE BILL:

1st. On the 3d of March, 1857, the Congress of the United States made a grant of lands to Minnesota, then a Territory, to aid in the construction of certain railroads in said Territory, among which was one "from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River,* with a branch via St. Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the Legislature of said Territory may determine."†

The quantity was six sections per mile, but the exact description of it was left to be determined and fixed by the subsequent definite location of the roads, it being every alternate section for [2] six sections in width on each side of said road and branch.‡

The grant was in the present tense, but it was provided "that the lands hereby granted for and on account of said roads and branches severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses." And, (Sec. 3,) that the said lands hereby granted to the said Territory or future State shall be subject to the future disposal of the Legislature thereof, for the purposes herein expressed and no other." * * *

And, (Sec. 4,) that the land hereby granted to said Territory or future State shall be disposed of by said Territory or future State only in the manner following, that is to say, that a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, and included within a continuous length of twenty miles of each of said roads and branches, may be sold; and when the Governor of said Territory or fu- [3] ture State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads and branches having twenty continuous miles completed, as aforesaid, and included within a continuous length of twenty miles of each of such roads or branches may be sold; and so from time to time, until said roads and branches are completed; and if any of said roads or branches is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States."‖

2nd. The Legislature accepted this grant with its conditions, &c., and on the 22nd of May, 1857, passed an act entitled, "An act to execute the trust created by an act of Congress entitled," &c., (title of said act of Congress.)§

This act is in three chapters, the first chapter of which is an act of incorporation and perpetual charter of a company by the

*Afterwards definitely fixed at Breckenridge, a distance of over 220 miles.
†Afterwards fixed at St. Vincent on the international boundary, a distance of over 400 miles.
‡Record, pp. 2–3, folios 4 and 5.
‖Record pp. 3–4, folio 7.
§Ibid 5, folio 9.

name of the Minnesota and Pacific Railroad Company, one of the [4] defendants in the bill and maker of said trust deed.

The company is by this act authorized to build said road from Stillwater to Breckenridge, and said branch from St. Anthony to St. Vincent, and to operate the same perpetually;* and besides all the usual franchises of railroad corporations, the act provides that the Company by its board of directors "shall have power to establish such rates of toll and charges for the conveyance of persons and property upon its said railroads as they shall from time to time direct and determine, and to change the same, and to levy and collect the same for the use of the said Company.† The whole power of the State, of eminent domain, is delegated to the company as a franchise so far as may be necessary for the construction, maintenance and use of the road‡, and it was further enacted as follows:

"SEC. 11. The said company is hereby authorized and empowered in its corporate capacity, to borrow any sums of money from any person or persons, corporation or body politic of any kind, and for any rate of interest which may be agreed upon by and between said company and any person or party of whom such [5] loan may be obtained, any law on the subject of usury in this Territory or future State, or any State where such transaction may be made, to the contrary notwithstanding; and to make, execute and deliver all necessary writings, notes, bonds, mortgages, or other obligations and securities, in amount and kind as may be deemed expedient by said corporation, in consideration of any such loan, or in discharge of any liabilities which it may incur in the construction, repair, equipment, or operating of said road; and the powers of the said company for the purposes aforesaid, and for all purposes necessary to carrying out the object of said company, are hereby ratified and confirmed, *and the contracts and official acts of said company declared binding in law and equity upon said company, and upon all other parties to said contracts.*"§

"SEC. 16. For the purpose of aiding in the construction of the railroads hereby authorized, all the interest and estate, *present and prospective*, of this Territory, and of the future State, which shall succeed it, in or to any or all of the lands granted by the Government of the United States to the Territory of Minnesota for the purpose of aiding in the construction of * * * * * [6] * * * * (said railroad,) together with all and singular the rights, privileges and immunities conferred or intended to be conferred by said Act of Congress, are hereby granted to said Minnesota and Pacific Railroad Company, conditioned that said land shall be exclusively applied to the construction of that road for which it was granted; *And Provided*, That the title of said land shall vest in the said Minnesota and Pacific Railroad Company, in the manner following, that is to say: Whenever twenty or more continuous miles of said road shall have been located, the Governor of the Territory or future State shall certify the same to the Secretary of the Interior, and thereupon the title to one hundred and twenty sections of said lands shall vest in the said Company; and when twenty continuous miles of said road

*Record, p. 5, folio 10.
†Ib. 7, folio 13.
‡Ib. 9, folios 16-19.
§Ib. 8, folio 15.

shall have been completed so as to admit of running regular trains [7] on the same, the Governor shall certify the same to the Secretary of the Interior, and thereupon a further quantity of one hundred and twenty sections of said lands shall vest in said company, until said roads are completed; and it shall be the duty of the Governor so to certify to the Secretary of the Interior whenever any such twenty miles are completed so as to admit of running regular trains of cars over the same, and the Governor shall in his official capacity, and on behalf of the Territory or State, and under the great seal thereof, execute and deliver to the said Minnesota and Pacific Railroad Company, whenever it shall by virtue of the provisions of this act, be entitled to any of said lands, a deed in fee simple of any and all of the lands to which said company shall be [8] entitled."*

And in consideration of the annual payment of three per centum of the gross earnings of the road, it is provided, "the said company shall be forever exempt from all assessments and taxes whatever by the Territory, or State which shall succeed the Territory, or by any county, city, town, village or other municipal authority in the Territory or State, upon all stock in the said "Minnesota and Pacific Railroad Company," whether belonging to said company or to individuals, and upon all its franchises or estate, real, personal, or mixed, held by said company, and said land granted by said act of Congress hereby authorized to be conveyed to the said Minnesota and Pacific Railroad Company shall be exempt from all taxation till sold and conveyed by said company."†

And (Sec. 20,) "The said Minnesota and Pacific Railroad Company shall be capable in law of taking and holding any lands granted by the Government of the United States or of this Territory, or of the future State or by other parties, which shall be conveyed to it by this act or by deed, gift or purchase, or by operation of law, and may *mortgage*, pledge, sell and convey the same, or otherwise dispose of all their right, title, interest, claim or demand of, in and to any such lands so granted to said company, and in any other estate, real, personal or mixed, of which said company may be seized, or which it may acquire subsequently thereto, in such manner and on such terms as the Directors may think proper."‡

[9] And (Sec. 21,) "The said company is hereby authorized and empowered in its corporate capacity, to make, execute, issue and deliver its bonds and obligations in any amount which the Directors may deem necessary or expedient; *Provided*, That the *faith* of the Territory or future State of Minnesota shall be in no wise pledged *for the redemption* of said bonds, * * * * and to secure the payment of all or any of said bonds, the said company is hereby authorized and empowered in its corporate capacity to make, execute and deliver one or more mortgages or deeds of trust upon the whole or any part of its railroad or branches, *constructed or authorized to be constructed*, and of the estate granted by this act, and any or all other of their estate, real, personal or mixed, *in possession or expectancy;* and said company is also hereby empowered and authorized in and by such mortgage or deed of trust, to confer upon the trustee or mortgagee full and ample powers *to enter into and upon, and to take possession*

* Record, pp. 11, 12; folios 20, 21.
† Ibid 13; f. 23.
‡ Ibid 18; f. 24.

of, have, use and employ, or to sell or dispose of, the whole or any part of said railroad and branches, and *all corporate and other franchises, rights and privileges* of the said company; and in case of any such sale, to grant and convey to the party or parties acquiring title under any such sale, and their associates, successors and assigns, all and the same rights, privileges, grants, franchises, immunities and advantages in and by such mortgage or deed of trust enumerated and conveyed, which belonged to and were enjoyed by the said company, as fully and absolutely in every respect as the said company, its stockholders, officers and agents might or could have done if such sale or foreclosure had not taken place."*

[10] 3d. The company was required to accept the act within thirty days, which it did,† and in all things perfected its organization.

4th. "The said company upon the completion of its organization as aforesaid, immediately entered upon the execution of the trusts, and the performance of the duties imposed upon it by the said acts, and its acceptance thereof, and during the year 1857, at great labor and expense surveyed and located the whole of said line of railroad from Stillwater to Breckenridge, and that part of the branch line of said road from Saint Anthony to Crow Wing; and thereupon caused the maps of such locations to be filed with the Governor of Minnesota, * * * * * * * * * and also with the Commissioner of the General Land Office of the United States, which said locations were at or about that time, approved by the Secretary of the Interior of the United States, and by his directions, the land granted by said act of Congress to aid in the construction of said roads, were allotted to the said company according to said locations of its lines of road and branch, and were thereupon reserved from sale by the United States, or pre-emption by settlers. And, about the same time, about thirty miles of the right of way for said road were secured by said company. And on or about the 27th day of July, 1857, the said company entered into a contract with one Selah Chamberlain, a responsible railroad contractor, for the construction of its said main line of railroad, from Stillwater, [11] by way of Saint Paul to Saint Anthony, and of its said branch line from Saint Anthony to Crow Wing, a total length of more than one hundred and forty miles of road; by the terms of which said contract that portion of said road between Saint Paul and Saint Anthony, a length of about ten miles, was to be completed, on or about the first day of October, 1858, and the whole distance from Stillwater to Saint Anthony, about twenty-seven miles, was to be completed by the first day of September, 1859; and thereafter the portion between Saint Anthony and Crow Wing was to be completed at the rate of not less than thirty miles in each year." Work was commenced under this contract, but after about one month, owing to the financial panic of that year, it was suspended and the contract abandoned by mutual consent. "At that time, the said company was largely in debt to many other persons besides said Chamberlain, for money borrowed, exceeding forty thousand dollars, in amount, and in other large sums, *for and on account of said surveys of its lines of road, and other expenses*

*Record p. 14; f. 25.
†Ib. 8, 24–5; folios 15, 41–2.

necessarily incurred in and about the construction of said road and branches, which debts it was wholly unable to pay."*

[12] 5th. The financial condition of the country and the interest the State had in the immediate prosecution of the work on the roads and their early completion led to the amendment of the constitution of the State on the 15th of April, 1858, providing for State aid to the several companies, by what was called a "loan of the credit of the State."†

This amendment among other things contained the following provisions:

"SEC. 10. The credit of this State shall never be given or loaned in aid of any individual, association or corporation, except that for the purpose of *expediting* the construction of the lines of railroads, in aid of which the Congress of the United States has granted lands to the Territory of Minnesota, the Governor shall cause to be issued and delivered to each of the companies in which said grants *are vested* by the Legislative Assembly of Minnesota, the special bonds of the State, bearing an interest of seven per cent. per annum, payable semi-annually in the City of New York, as a *loan of public credit,* to an amount not exceeding twelve hundred and fifty thousand dollars, or an aggregate amount to all of said companies not exceeding five millions of dollars, in manner following, to-wit:

[13] "Whenever either of said companies shall produce to the Governor satisfactory evidence, verified by the affidavits of the Chief Engineer, Treasurer and two Directors of said company, that any ten miles of the road of said company has been actually constructed and completed, ready for placing the superstructure thereon, the Governor shall cause to be issued and delivered to such company, bonds to the amount of one hundred thousand dollars; and whenever thereafter, and as often as either of said companies shall produce to the Governor like evidence of a further construction of ten miles of its road, as aforesaid, then the Governor shall cause to be issued to such company further like bonds to the amount of one hundred thousand dollars for each and every ten miles of road thus constructed; and whenever such company shall furnish like evidence that any ten miles of its road is actually completed and cars running thereon, the Governor shall cause to be issued to such company like bonds to the amount of one hundred thousand dollars; and whenever thereafter, and as often as either of said companies shall produce to the Governor like evidence that any further ten miles of said road is in operation, as aforesaid, the Governor shall cause to be issued to such company further like bonds to the amount of one hundred thousand dollars, until the full amount of the bonds hereby authorized shall be issued; * * *

[14] The said bonds thus issued shall be denominated 'Minnesota State Railroad Bonds,' and the faith and credit of the State are hereby pledged for the payment of the interest and the redemption of the principal thereof. They shall be signed by the Governor, countersigned and registered by the Treasurer, sealed with the seal of the State, of denominations not exceeding one thousand dol-

*Record, p. 26; f. 45. (Note.)—This indebtedness was afterwards paid in the bonds issued under the said trust deed—Record, pp. 30–31. *Post*, folio 20.

†Record, pp. 26–7; f. 46.

lars, *payable to the order of the company to whom issued, transferable by the endorsement of the President of said company,* and redeemable at any time after ten and before the expiration of twenty-five years from the date thereof. Within thirty days after the Governor shall proclaim that the people have voted for a loan of State credit to railroads, any of said companies proposing to avail themselves of the loan herein provided for, and to accept the conditions of the same, shall notify the Governor thereof, and shall, within sixty days, commence the construction of their roads; and shall, within two years thereafter, construct ready for the superstructure at least fifty (50) miles of their said road. Each company shall make provision for the punctual payment and redemption of all bonds issued and delivered as aforesaid to said company, and for the punctual payment of the interest which shall accrue thereon, *in such manner as to exonerate the Treasury of the State* [15] *from any advances of money for that purpose;* and as security therefor, the Governor shall demand and receive from each of said companies, before any of said bonds are issued, an instrument pledging the net profits of its road for the payment of said interest, and a conveyance to the State of the first two hundred and forty sections of land, *free from prior incumbrances,* which such company is or may be authorized to sell, in trust for the better security of the treasury of the State from loss on said bonds, which said deed of trust shall authorize the Governor and Secretary of State to make conveyances of title to all or any of such lands, to purchasers agreeing with the respective railroad companies therefor; *Provided,* That before releasing the interest of the State to such lands, such sale shall be approved by the Governor, but the proceeds of all such sales shall be applied to the payment of interest accruing upon the bonds in case of default of the payment of the same, and as a sinking fund to meet any future default in the payment of interest and the principal thereof when due; and *as further security,* an amount of first mortgage bonds on the roads, lands and franchises of the respective companies, corresponding to the State bonds issued, shall be transferred to the Treasurer of [16] the State, at the time of the issue of State bonds; and in case either of said companies shall make default in payment of either the principal or interest of the bonds issued to said companies by the Governor, no more State bonds shall thereafter be issued to said company, and the Governor shall proceed in such manner *as may be prescribed by law,* to sell the bonds of the defaulting company or companies, or the lands held in trust as above, or *may require* a foreclosure of the mortgage executed to secure the same; *Provided,* That if any company so in default, before the day of sale, shall pay all interest and principal then due, and all expenses incurred by the State, no sale shall take place, and the right of said company *shall not be impaired to a further loan of State credit; Provided* If any of said companies shall at any time offer to pay the principal, together with the interest that may then be due upon any of the Minnesota State Railroad Bonds, which may have been issued under this section, then the Treasurer of State shall receive the same; and the liabilities of said company or companies, in respect to said bonds, shall cease upon such payment into the State treasury of principal together with the interest as [17] aforesaid, *Provided, further,* That *in consideration* of the loan of State credit herein provided, that the company or companies which

may accept the bonds of the State in the manner herein specified, shall, as a condition thereof, each complete not less than fifty miles of its road on or before the expiration of the year 1861, and not less than one hundred miles before the year 1864, and complete four-fifths of the entire length of its road before the year 1866, and any failure on the part of any such company to complete the number of miles of its road or roads in the manner and within the several times herein prescribed, shall forfeit to the State all the rights, title and interest of any kind whatsoever in and to any lands, together with the franchises connected with the same, not pertaining or applicable to the portion of the road by them constructed, and a fee simple to which has not accrued to either of said companies, by reason of such construction, which was granted to the company or companies thus failing to comply with the provisions hereof, by act of the Legislature of the Territory of Minnesota, [18] *vesting* said land in said companies respectively." *

Said amendment was duly accepted by the said Minnesota and Pacific Company in manner as therein provided. †

6th. "The said company, in full and confident reliance upon the good faith of the State of Minnesota, and upon the credit and aid of said State by her credit as in and by said amendment provided and pledged to it; and that upon its acceptance by said company the same would become a *contract* with it, the *obligation of which could not be impaired* by any subsequent act of the said State," entered into new contracts and incurred new expenses for the construction of said road, which it could not carry out and meet, unless the State should stand by and perform the contract of said constitutional amendment, nor without making the deed of trust in question and issuing its bonds thereunder, as authorized by said 21st section of its charter. ‡

7th. "And on the 31st day of July, 1858, under and p ursnant to the power and authority conferred upon it, by said section twenty-one, chapter one of act of May 22, 1857 (the Charter of said company), in order that it might thereby be enabled to meet, keep and perform all its engagements, obligations and promises [19] undertaken, created and made by its said acceptance of said amendment of the constitution and the said contracts with its contractors, and also pay the said debts by it contracted and incurred in the year eighteen hundred and fifty-seven for surveys, &c., as herein before stated, and which still remained unpaid, the said Minnesota and Pacific Railroad Company, in its corporate capacity, did duly execute under its corporate seal and deliver to the trustees therein named in trust for the holders of the bonds therein described, as therein set forth, a certain indenture or deed of trust and mortgage which is set forth at full length in the bill. ‖

This deed recites the said grant of lands by Congress, the said act of the legislature incorporating said company, and the grant to it thereby of said public lands; the power conferred upon said company by said 11th and by said 21st sections of the said act, the

*Record, pp. 27-9; folios 46-50.
†Ib. p. 29
‡Ib. pp. 29-30; folios 52-4.
‖Record, pp. 30, 42; folios 56-77.

organization of the company under and according to the act,* and [20] these recitals:

"Whereas, the said party of the first part has deemed it advisable to provide for the issue and disposal, now and hereafter, of its bonds sufficient to pay *all present liabilities*,† and provide for the payment of the contract already entered into between it and Selah Chamberlain, for the construction of fifty miles of its road from Saint Paul to Saint Anthony, and thence up the Mississippi river *via* Anoka to Big Lake, and also the means for the further construction, completion and equipment of its said railroad, from time to time, as shall be deemed expedient and prudent, and by the issue and disposal of such bonds, to become indebted to various persons and bodies politic or corporate, who shall become the holders of said bonds or obligations;

"And whereas, for the purpose of more effectually securing the said bonds, it is expedient that the party of the first part should execute a mortgage deed upon its property and franchises, as hereinafter specified, in security for the payment of the principal and interest of said bonds, which said bonds so to be issued, shall each be in the sum of one thousand dollars, and shall be regularly numbered and signed by the president and secretary of the said party of [21] the first part, and registered and countersigned by the parties of the second part hereto, trustees, and shall be at such a rate of interest (with coupons therefor attached) as may from time to time, as issued, be decided upon, not to exceed the rate of seven per centum per annum, and shall all become due to the holders thereof, on the first day of August, A. D. 1883, and are to be issued in series and in parcels, from time to time, as required for the purposes aforesaid, in the aggregate to the amount of twenty-three millions of dollars, or at the rate of, but not exceeding thirty-five thousand dollars for each mile of road, if found necessary as hereinafter specified, and are to stand equally and ratably secured by these presents, according to the respective amounts, *without any preference in respect to priority of date or time of issue.*" ‡

The *first* part of the grant is expressed in these words:

"Now, therefore, this indenture witnesseth, that the party of the first part in consideration of the premises, and of the sum of one dollar [22] in hand paid by the parties of the second part, the receipt of which is hereby acknowledged, and in order to secure the bonds to be issued as herein provided, and the interest thereon, and every part thereof, as the same shall from time to time become due and payable, according to the tenor and effect thereof, and the coupons or interest warrants thereto annexed, hath granted, conveyed, transferred and assigned, and by these presents doth grant, convey, transfer and assign unto the said parties of the second part, as joint tenants and not as tenants in common, and to their survivors or successors in the trust hereinafter expressed, the entire railroad of said party of the first part, from Stillwater by way of Saint Paul and Saint Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood river, with a branch from Saint Anthony, via Anoka, Saint Cloud and Crow Wing, to Saint Vincent, near the mouth of the Pembina river; also, all the railways, rails, bridges, fences, ties, spikes, culverts, right of way, station-houses and other

*Folios 5-8-9.

†(Note.) Liabilities for surveys, &c., p. 187, ante folio 10. Record p. 26

‡Record p. 34, folios 60, 61.

buildings, and such lands as are selected or actually in use for de-
[23] pots or station grounds, now held or owned, or which may hereafter be held or owned, by said party of the first part, for the purpose of constructing, operating, and maintaining its said railroad, or the accommodation of the business thereof; also, all the *tolls, income, rents, issues, profits,* and *alienable franchises* of the said party of the first part, connected with its said railroad or relating thereto; also, all the locomotive or stationary engines, tenders and cars of every kind, machinery, machine shops, tolls, and implements and materials connected with, or intended for the construction, equipment, operating and conducting of said railroad and branch hereby conveyed or intended to be conveyed, now owned or *hereafter to be acquired* by the party of the first part, all of which are declared to be appurtenances and fixtures of said railroad, and are to be used and sold therewith, and not separated therefrom, and are to be taken as part thereof. And the party of the first part agrees to furnish to the parties of the second part, or the survivors of them, or their successor, or the successors of each survivor, from time to time, upon their or his reasonable request, a true and full inventory of all the movable property appertaining to said railroad and the operation thereof, and which is transferred or agreed to be transferred by this indenture; but no default to demand or to furnish such inventory shall impair the operation or effect of this indenture, upon all or any of the property herein
[24] agreed to be transferred;

To have and to hold the said granted premises, unto the said parties of the second part as joint tenants, and not as tenants in common, and their survivors or successors in the trust hereby created, on the trust, and for the purposes following, that is to say:

First. If the interest on the bonds so to be issued shall not be paid by the party of the first part, when the same shall fall due, and if there shall be no moneys in the hands of the parties of the second part, out of which said interest may be paid in accordance with the provisions of this indenture, and if such interest shall remain in arrear for six months after having been demanded, or if there shall be a failure to pay the principal of said bonds, or any of them, or any part thereof, when due and demandable, according to the tenor and effect thereof, then and in either case, it shall be lawful for the parties of the second part, or the survivors of them, or his or their successors in the trust hereby created, *to take possession of all and singular the said premises hereby conveyed or transferred, or expressed, or intended so to be, and to cause the said railroad to be used and operated, and kept in repair, and its business conducted, by themselves or such agents, superintendents, managers and servants, as they may appoint, and to apply the net income received therefrom to the payment, first, of the interest of said bonds, and the surplus to the payment of the principal thereof,* if any there be due. And at any time after such default, upon the request of the
[25] holders of two hundred and fifty thousand dollars in amount of said bonds, upon being indemnified for their costs and expenses, said parties of the second part or their successors under this indenture, may *and shall* enter upon and take possession of, or if already in possession, shall upon such request, sell all and singular the said premises hereinbefore and hereinafter conveyed and transferred, or expressed or intended so to be, or only so much, or such parts thereof, as they shall deem necessary and proper with a due regard to the interests of all parties, first giving notice by adver-

tisement in two daily newspapers, printed in the cities of Saint Paul and New York, to be continued for four months or such shorter time, not less than forty days, as the party of the first part may by resolution of its board of directors, assent to; and until such sale, may operate the said railroad as aforesaid, being accountable for, and applying the income of said roads as herein- [26] before expressed.*

There is this covenant for further assurance:

"*Third.* The party of the first part covenants with the parties of the second part, and their successors in this trust, for the benefit of the holders of said bonds, that the party of the first part shall and will, at the reasonable request of the parties of the second part, and their successors in the trust hereby created, make and execute all further assurances, conveyances and instruments, needful or proper to convey unto them, upon the trust and conditions herein contained, all the said premises expressed or intended to be granted as aforesaid, and all which may hereafter appertain to the said road."†

There are other conditions and trust not necessary in this abstract and then comes the *second* part of the grant in these words:

"And the party of the first part, for the consideration hereinbefore expressed, and for the more ample and perfect security for the payment of the bonds aforesaid, to be issued as herein provided, and the interest thereon, and every part thereof, as the same shall from time to time become due and payable, according to the tenor [27] and effects of said bonds, and the coupons or interest-warrants thereto annexed, hath granted, bargained, sold, conveyed, assigned and confirmed, and by these presents doth grant, bargain, sell, convey and assign, unto the said parties of the second part, as joint tenants, and not as tenants in common, and to their survivors or successors, in the trust herein expressed, all the right, title, interest, claim or demand which the said party of the first part now has, or which it shall or may hereafter acquire or become entitled to, in or to all those sections or parts of sections of land granted to the late Territory of Minnesota, by the act of Congress of the United States of America, the title to which is hereinbefore given, approved on the third day of March, A. D. 1857, for the purpose of aiding in the construction of a railroad from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood river, with a branch via Saint Cloud and [28] Crow Wing, to the navigable waters of the Red River of the North, at such point as the Legislature of said Territory may determine, and which were subsequently granted to said party of the first part, by an act of the late Territory of Minnesota, approved on the twenty-second day of May, A. D. 1857, entitled as hereinbefore stated, for the purpose of aiding the said party of the first part in the construction of a railroad from Stillwater, by way of Saint Paul and Saint Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood river, with a branch from Saint Anthony, via Anoka, Saint Cloud and Crow Wing, to Saint Vincent, near the mouth of the Pembina river, being in all about two million four hundred and sixty-

*Pages 34-35; folios 61-3.
†Folio 66.

seven thousand and six hundred acres of land, be the same more or less, and situated in the present State of Minnesota, adjoining and adjacent to the line of railroad of said party of the first part, and its branch, as hereinbefore described, full lists of which will be appended to this instrument, as said lands are surveyed, selected and certified, said lists to be signed by the president of the company and to be taken and considered as part and parcel of this deed without reference to the dates of said lists, together with all and singular the endowments, income, and advantages, tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title and interest, property, possession, claim and demand whatsoever, at law or in equity, present or *prospective*, of the said party of the first part, of, in and to the same and each [29] and every part and parcel thereof, with the appurtenances;*

Then follows a further specification of terms, conditions and provisions of the indenture, among which are the following:

"*Second.* It is agreed between the parties hereto, that the said party of the first part, having already contracted for the construction and completion of fifty miles in length of its road, from Saint Paul to Saint Anthony, and thence up the Mississippi river via Anoka, to Big Lake, may now proceed to execute and dispose of a first issue of its bonds, for the purposes aforesaid, to the amount of one million seven hundred and fifty thousand dollars, being at the rate of thirty-five thousand dollars for each mile of its road, so as aforesaid contracted for, the same to be registered and countersigned as before stated. And it is understood and agreed between the parties hereto, that the said party of the first part may at any time hereafter, so often as the construction of a section of its said railroad, or its branch, of forty miles in length, additional to the said fifty miles now under contract, shall be contracted for, make further issues of its bonds for the purposes aforesaid, to an amount not exceeding thirty-five thousand dollars for each mile of every section of forty miles so to be contracted for, and so on as the work progresses, and until the final completion [30] of said railroad and its said branch."† * * *

It is further agreed, that the lien of this deed is subject, as to the first 240 sections of land and the net profits of the road, to the lien of the State provided for in the constitutional amendment,‡

And after the execution and acceptance of said deed of trust as aforesaid, on the same day thereof, the said company in its corporate capacity and character, by its said corporate name, and under its corporate seal, in accordance with the provisions of said deed, made and executed nine hundred bonds of the said company, of the denomination of one thousand dollars each, with interest coupons attached thereto, which were duly countersigned and registered by said trustees, of which the following is a copy:

THE UNITED STATES OF AMERICA.

STATE OF MINNESOTA.

[31] The Minnesota and Pacific Railroad Company.

$1,000. No.———247. $1,000.

KNOW ALL MEN BY THESE PRESENTS, That the Minnesota and

*Record, pp. 37–8. folios 67-9.

†Record, p. 39, f. 70.

‡P. 41, f. 75. NOTE—This lien of the State was released by act of March 8, 1861, *post.*, folio 67.

Pacific Railroad Company is indebted to the bearer hereof in the sum of One Thousand Dollars, lawful money of the United States of America, for money borrowed for the construction and equipment of its road from Stillwater by way of Saint Paul and Saint Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood River, and from Saint Anthony, via Anoka, Saint Cloud and Crow Wing to Saint Vincent, near the mouth of Pembina River, and in consideration of such indebtedness, the said Minnesota and Pacific Railroad Company promises and agrees to pay the bearer hereof, on the first day of August, in the year 1883, at the office of the Company, in the city of New York, the said sum of one thousand dollars, with interest at the rate of seven per centum per annum, payable at the said office of the Company, in the city of New York, in semi-annual installments, on the first days of February and August in each year, on presentation and [32] delivery of the interest warrants or coupons hereto annexed.

This is one of a series of first mortgage bonds, all of the same tenor, and numbered from one to twenty-three thousand, respectively, which make in the aggregate the sum of twenty-three million dollars, to secure the payment of all which bonds, a deed of trust has been executed by said Railroad Company to Elon Farnsworth, Edward P. Cowles and William H. Welch, conveying all such interest as said Railroad Company has acquired, or *may hereafter acquire*, in all the lands granted to said Railroad Company, by an act of the Legislative Assembly of the late Territory of Minnesota, approved on the twenty-second day of May, A. D. 1857, entitled an act to execute the trust created by an act of Congress (entitled an act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, &c.), approved March 3d, 1857, so far as the lands granted by said act of the Legislative Assembly of the late Territory of Minnesota are applicable to the construction of the road of said Railroad Company from Stillwater, by way of St. Paul and St. Anthony, via Minneapolis, to the town of Breckenridge, on the Sioux Wood River, and from St. Anthony via [33] Anoka, Saint Cloud and Crow Wing to St. Vincent, near the mouth of the Pembina River, estimated to be about Two Million Four Hundred and Sixty-Seven Thousand Six Hundred acres of land in all; and also conveying all such interest as said Railroad Company has acquired, or *may hereafter acquire* in said road as above described, with all the equipments and other things pertaining to said road. *Reference to which trust deed, bearing date the 31st day of July, A. D.* 1858, *and reciting the said acts of Congress and the Legislative Assembly of the late Territory of Minnesota, is hereby had and made for a more full description of said lands, road and other property, and the interest thereby conveyed to said Trustees.* This Bond, however, is not to be considered as secured by said trust deed, unless the same shall have been registered and countersigned by said Trustees, their survivors or successors. *In witness whereof*, the said Railroad Company hath hereto affixed its corporate seal, with the names of its President and Secretary, the 31st day of July, in the year of our Lord one thousand eight hundred and fifty-eight.

EDMUND RICE, President.

[34] JAMES W. TAYLOR, Secretary.

Registered and countersigned by the Trustees.

[Corporate Seal.]

ELON FARNSWORTH,
EDWARD P. COWLES,
WILLIAM H. WELCH,
} Trustees.

(FORM OF COUPONS.)

$35. $35.

THE MINNESOTA AND PACIFIC RAILROAD COMPANY,

Will pay the bearer hereof, at their office, in the city of New York, thirty-five dollars on the first day of August, 1862, it being the interest to that date on their Bond, No. 247, for $1,000.

For the Company,

JAMES W. TAYLOR,
Secretary. *

And afterwards one hundred and fifty-eight more of the same series of bonds and coupons mentioned in and secured by said deed of trust, and bearing even date therewith, were duly made and executed by said company, and duly countersigned and registered by said trustees, and by them delivered to said company, and by it duly issued, paid out, and delivered to its creditors for and in payment of money advanced to it for the use and construction of its said roads, and for labor and services performed in and [35] about such construction.

And a large number of the said bonds were issued and delivered to creditors of the said company, in payment of debts due from it to them, prior to the twenty-seventh day of November, A. D. 1858.†

8th. *After* the execution of said trust deed Aug. 12, 1858, the legislature passed an act which was never *accepted by the company or said trustees.*‡

This act is largely a legislative enactment of the provisions of the constitutional amendment. But in *addition thereto* it provides that the several companies shall make the semi-annual payments of interest and the principal on their bonds which should be transferred to the State payable sixty days before the maturity of the interest and principal on the State bonds (but does not nor did any other act fix the time of date or maturity of the State bonds). It also provides that the companies shall pay all expenses incident to carrying out the provisions of said amendment, and undertakes to regulate the foreclosure, if that should become necessary, of the mortgages of the companies, as well as the sale of the bonds of the company or the said 240 sections of land held by the State in trust,‖ (see *ante folio* 15) and the bill charges that except as to the last matter—the sale of bonds and said 240 sections—this act [36] did not bind the company or trustees.

9th. On the 5th of Nov..1858, the said company had done and performed all those things which under the provisions of said constitutional amendment would entitle it to demand and receive from the State $300,000, in amount of said Minnesota State Railroad bonds; that is to say, said company had produced to the Governor satisfactory evidence that thirty miles of the road of said company had been actually constructed and completed ready for placing the superstruction thereon; which was, in fact true, and had made, executed, and delivered such pledge of net profits and conveyance of the first 240 sections of land, as was required by said amendment.§

"And said company then and there offered and tendered to said Governor, and offered to transfer to the Treasurer of the State,

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*Record, pp 43, 44, folios 79, 80.

†Ib. 45, f. 82. (Note.) That is prior to making of the supplemental deed—*post* folio 42.

‡ Page 48, folio 87.

‖Record, p. 46, folios 83-6.

§Record, pp. 48-56; folios 86-98.

three hundred—being three hundred thousand —of the said first mortgage bonds of said com hereinbefore referred to, with all the coupons [37] by the said deed of trust, of the roads, l of said company, which said deed of trust then filed for record with the Secretary of St Minnesota, where the same now remains.*

"And thereupon, then and there, the said company requested the said Governor to cause to be issued and delivered to it, the said company, in accordance with the said amendment to the Constitution, 'Minnesota State Railroad Bonds' to the amount of three hundred thousand dollars. But the said Governor then and there refused so to issue and deliver, or cause to be issued and delivered to said company, the said amount or any amount whatever of such State Bonds, unless and until the said company should in addition to said other securities, make,

"*Also*, a deposit of first mortgage bonds of the company made to the State, based upon a deed of trust to the State equal in amount to the State bonds issued to such company, which deed of trust shall specify a priority of lien to such bonds as the company may deliver to the State in exchange for the bonds."† Against which the company protested, &c.

10th. The Governor agreed to submit the question to the Supreme Court of the State for adjudication, and it was so submitted upon an application for mandamus' the Governor voluntarily appearing by the Attorney General. And afterwards the court decided that "the said company had done all that was necessary under the constitution to entitle it to the amount of State bonds [38] it had demanded as aforesaid."‡

11th. "After the rendition of said judgment of said Supreme Court, to wit, on the seventeenth day of said month of November, eighteen hundred and fifty-eight, the company purchased, from one James M. Winslow, nineteen lots, and part of a lot, of land in the city of Saint Paul, Minnesota, for the use, and which were necessary for the use and occupancy of said company, by and for its said railroad at that place, the price and consideration for which was the sum of thirteen thousand dollars. And the said Winslow, upon the faith and credit of said decision of said Supreme Court, agreed to accept, and did accept, payment of the whole of said consideration money in the said first mortgage bonds of said company, at their par value. And thereupon, on the day last afore- [39] said, said Winslow and his wife conveyed the said lands to said company, by a good and sufficient warrantee deed, duly executed, acknowledged and delivered. And on the same day, in consideration aforesaid, the said company delivered thirteen of its said mortgage bonds, with all the coupons thereto attached, to said Winslow, which said bonds and coupons are still outstanding and wholly unpaid, though a large number of said coupons, for interest thereto attached, have long been due. And the said company, and its successors, the said Saint Paul and Pacific Railroad Company, and the said first division of the St. Paul and Pacific Railroad Company and other defendants, have ever since retained, and do now retain the title, possession, use and occupancy of said lands."‖

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* Folio 98.
†Record pp. 57-8; folios 100-101.
‡Ib. 58-9, folio 103; (2 Minn. Rep. 22.)
‖Record p. 59; fol. 104.

Yet the Governor refused to abide by the decision of the court and deliver the company said amount of State bonds, except upon [40] new conditions and requirements, among which conditions were, that the said company and the said trustees should execute and deliver to him a supplement to the said deed of trust, of July 31st, 1858, a copy of which supplement is set forth in the bill.*

"And at or about the same time, the said Governor made it a further and additional condition of the issue and delivery to said company of any of said State bonds, that the said company should then and there execute and deliver to him, the said Governor, a stipulation in writing, that only one-half of the State bonds, to which the said company might become entitled under and according to the said constitutional amendment, should be drawn by it upon account of the grading and constructing and completing its road ready for placing the superstructure thereon."†

The company was in critical financial condition.

"And thereupon, under the duress and compulsion thus by the Governor of Minnesota exercised over the said company in its then critical financial condition and embarrassments, by his, said [41] Governor's refusal to deliver to it any of said State bonds, and fearful of the effect upon the credit and financial standing of said company, which would be produced by a prolonged controversy with the Governor of the State, and being unable to procure any of said State bonds without compliance with said demands and exactions, and so constrained and forced, by its position under said refusal of said Governor, and by its circumstances, necessities and fears, and without any consideration or other cause, and under protest, executed said supplement to said trust deed and said trustees on or about December 1st, 1858, and under protest signed the same."‡

This supplement is dated Nov. 27th, 1858,‖ and after referring to the original deed it recites, "whereas, a portion of the bonds of the said the Minnesota and Pacific Railroad Company, which are secured by said trust deed, are to be delivered to the State of Minnesota, corresponding to an amount of the bonds of said State [42] which shall or may be issued and delivered to said company.

"And whereas, the said trustees, in and by said trust deed, are authorized and empowered, in case of default in the payment of the interest or principal of said bonds as therein mentioned, to make sale of all or any of the property conveyed and transferred to them, or expressed, or intended so to be, in and by said trust deed in the manner therein specified.

"And whereas, it is intended and desired that punctual payment of the interest and principal on the bonds so to be delivered, and held by the State as aforesaid, shall be secured, and as a supplement to, and as a part of said trust deed, the said trustees therein mentioned, or the survivor or survivors of them, or his or their successors in the trust thereby created, are hereby authorized and directed, in case of a default in the payment of *such interest* and principal, upon the demand and request of the Governor of said State, as the agent of said State, to foreclose such trust deed, and to take possession of all and singular the said premises conveyed and transferred, or expressed or intended so to be, in and

*Pp. 60-3; folios 105,109-112.
†Ib. 60; fol. 105.
‡Ib. 61.
‖(NOTE.) This was after the delivery of bonds to Winslow.

by said trust deed, and shall, upon such demand and request, sell [43] such premises and property, or so much thereof as the said Governor may direct, pursuant to the terms and provisions of *said trust deed;* except that in case of such foreclosure and sale, pursuant to such demand and request as aforesaid, *such sale* shall be made *within sixty days after such default* as aforesaid shall be made, and public notice of such sale shall be given by advertisement in one daily newspaper printed and published in the city of New York, and in one daily newspaper printed and published in the city of St. Paul, for six weeks successively; and in case of the failure or refusal of the said trustees, or the survivor or survivors of them, or their successors, to comply with such demand and request of the said Governor to make such foreclosure and sale as aforesaid, then the said Governor of the State, *as the agent* of the said State, is hereby authorized and empowered to make, or cause to be made, such foreclosure and sale as aforesaid, so that said foreclosure and sale shall be made within *sixty days* after the occurrence of any *default* as aforesaid, on the part of said company,* [44] anything in the trust deed, or in this deed, which is supplementary thereto, to the contrary notwithstanding. And in case of the said foreclosure and sale as aforesaid, by the Governor of the State, *as the agent* of the said State, the said Governor of the State is hereby authorized and empowered for and in the name of the said Minnesota and Pacific Railroad Company, to make, or cause to be made, good and sufficient deeds of conveyance, or other necessary instruments of transfer, of the road, lands, franchises, or other property of the said company, or any part thereof, as may be foreclosed and sold as aforesaid, which said deeds of conveyance, or other necessary instruments of transfer, as aforesaid, shall include and embrace all the rights, interest, ownership, claim and demand of the said company, party of the first part, and of the said parties of the second part, in and to the said premises sold as aforesaid, in law and equity.

[45] In case of a foreclosure and sale as herein mentioned, whether by the said trustees, or the said Governor, the proceeds arising from such sale shall be applied to the payment of the amount due on the *bonds secured by said trust deed, as therein provided;*† but if such foreclosure and sale shall be made by the Governor, as aforesaid, all damages, costs, charges and expenses which said State has sustained or incurred by reason of the default aforesaid, shall be paid out of such proceeds; and in case of a foreclosure and sale by the trustees as herein provided, the costs and expenses of the same are to be paid by the said party of the first part, and not by said State. * * *

"And all parts and provisions of said trust deed, and particularly those contained in the fourth term, condition or provision, on page eleven of said trust deed, which are inconsistent or in conflict with this instrument, are declared to be inoperative and void."‡

And under like duress the company gave the said written stipulation demanded by the Governor.

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*The foreclosure sale, on June 23d, 1860, hereinafter mentioned, was not made within such time.

†NOTE.—This provision was ignored in the foreclosure afterwards made under this supplement.

‡Record, pp. 62-3.

12th. "Afterwards there was a demand by capitalists for the said Minnesota State railroad bonds, to be used as they lawfully might be, [46] as and for a basis and security for banking and issuing currency in said State of Minnesota under the general banking law thereof; and the Governor and State Auditor of said State, whose province and duty it was under such law, to receive deposits of such State bonds as such basis and security for banking, and to authorize banking thereon, had received a portion of the said Minnesota State railroad bonds, issued to each of the three other companies, who were recipients of the same under said Constitutional Amendment, and authorized banking and the issuing of currency thereon, at the rate of ninety-five cents on the dollar of such bonds; and this fact and use of such bonds created a great demand for them and gave them great value and credit, and thereby made such bonds a means of aiding said companies in the construction of their several roads, as was intended by said Constitutional Amendment.

"And the holders of such State bonds which had been delivered to said Minnesota and Pacific Railroad Company, and by it paid out to its contractors as aforesaid, applied to the said Governor and Auditor to receive such bonds also, as a security and basis for banking and issuing currency as aforesaid, at the same rate as said other bonds, and upon an equal footing therewith; but the said [47] Governor and Auditor then and there demanded that the said company should execute, and procure said trustees to execute and deliver another and second supplement to said first deed of trust, set up in the bill as a condition precedent to receiving said bonds on an equal footing with said other Minnesota State railroad bonds, as a basis for banking and issuing currency aforesaid."

The company constrained by its necessities complied with this new demand,* but the trustees would not, and because of their refusal the Governor and Auditor refused to receive any of the said State bonds that had been issued to said Minnesota and Pacific Company, as a bond and security for banking and issuing currency at any rate of percentage or discount, or on any terms whatever, and thereby, and in consequence thereof, said bonds of the State so delivered to said company became and were greatly discredited, and of little value in the money markets. And the same did not, as was intended by the said Constitutional Amendment, repre- [48] sent the "credit of the State of Minnesota," and were not, in fact, a loan of her credit within the true intent and meaning of such constitutional provision, and such demand and refusal by said Governor and Auditor most seriously impaired the ability of the said company to construct and complete its said roads."†

13th. Before and up to the 28th day of September, 1859, the said company had actually constructed and completed, ready for placing the superstructure thereon, over sixty-two and one-half miles of its said roads, and had paid all the interest upon all its said first mortgage bonds held by said State, which fell due on the first days of February and August respectively of that year, and had exonerated the treasury of the State from any advances of money on account of the interest which had become due on the State bonds issued to said company. And on the said 28th day of September, the said company duly presented and produced to the

*Record p. 65.
†Ib. 66-7.

said Governor of said State, satisfactory evidence, verified by the affidavits of the chief engineer, treasurer and two directors of said
]49] company, that sixty-two and one-half miles of its said railroad had been so constructed and completed. That prior to that time, the said company had delivered to the treasury of said State six hundred and twenty-five of the said first mortgage bonds on the roads, lands and franchises of said company, of the denomination of one thousand dollars each, and amounting, in all, to six hundred and twenty-five thousand dollars, and then and there presented to said Governor the receipts of said treasurer therefor; that said Governor then and there received said evidence of said construction and completion as satisfactory, and received said receipts of of said treasurer as satisfactory evidence of the said delivery of said bonds to said treasurer; that said Governor had, prior to that time, issued and delivered to the said company, upon the terms and conditions exacted by him as aforesaid, six hundred of said State bonds amounting to six hundred thousand dollars, and no
[50] more; and on said 28th day of September, 1859, said company demanded of said Governor that he should cause to be issued and delivered to it State bonds aforesaid to the amount of twenty-five thousand dollars, in addition to those previously so issued and delivered, being the amount to which the said company was entitled under said Constitutional Amendment and said stipulation, so to receive from said Governor in behalf of said State; and the said Governor then and there refused so to deliver to said company said State bonds to the amount of twenty-five thousand dollars, or any other amount in addition to said six hundred before as aforesaid delivered through the said State, then and there retained, and still does retain the whole of the six hundred and twenty-five thousand dollars of the first mortgage bonds of said company, as aforesaid delivered to her. And up to this time the said company had in all things faithfully done, kept, performed and discharged all the requirements, duties, obligations and things by it to be done, kept, performed and discharged under the said Amendment to the Constitution, and its acceptance thereof as aforesaid.*

14th. On the 1st day of December, 1859, the Governor addressed
[51] a letter to the trustees in which he said:

"Gentlemen—I have been officially informed by the State Treasurer that no provision has been made by the company of which you are the trustees to pay the interest on the *State Railroad Bonds* delivered by me to that company in accordance with law, which interest is due this day upon said bonds. Default having been made in such payment, I hereby, on the part of the State of Minnesota, request and require you to make a foreclosure of the mortgage or trust deed of the said company made to secure *their* first mortgage bonds, which have been deposited with the Treasurer of the State in return for the State bonds issued to that company at as early a period as the terms of said mortgage or trust deed will permit."†

The trustees in reply, among other things, said to the Governor:

"With the interest upon those *State bonds*, as such, we, as trustees, have nothing to do; nor can we foreclose, under our trust deed, to pay the interest upon the *State bonds*.

*Record p. 67.
†Ib. 68.

"What the Governor of Minnesota can do under that supple-
[52] mental trust deed is this:

"If the State of Minnesota are holders—as no doubt they are—of some of the bonds of the M. & P. R. R. Co., on which there is any unpaid interest due, the government can give the trustees notice that the State holds such bonds; that they were given in exchange for a corresponding amount of the bonds of the State issued to that railroad company; that the interest upon the *railroad* company's bonds, so held by the State, specifying them by their respective numbers, which fall due at such and such time, is due and unpaid, and that the trustees are required to foreclose and sell under their trust deed, in order to pay the interest on their railroad (*not State*) bonds; and under *such notice* the trustees would have only to proceed and sell."*

The Governor made no reply and never notified the trustees of any default of the company in the payment of its bonds secured by said trust deed, nor demanded any proceedings by them except
[53] as in his said letter of December 1st.†

15th. On January 13, 1860, the Legislature passed the following joint resolution:

"Resolved by the Legislature of the State of Minnesota,

"That the Governor be, and he is hereby directed to cancel and destroy the blank and unissued Minnesota State railroad bonds delivered to him by Governor Sibley, and that a committee of three on the part of the Senate and a committee of four on the part of the House be directed to be present on the occasion."‡

And immediately afterward said blank bonds were destroyed by burning them.

And the bill avers that at that time the company had fully performed all its obligations under the constitutional amendment, and was not in default in the payment of any interest due said State upon the bonds of said company held by her, and the said company had fully exonerated the State Treasury from liability on account of interest then due upon the State bonds delivered to said company, and was in no wise in arrear to the State therefor. And that by reason of the said failure and refusal of the State of Minnesota, by her chief executive, as aforesaid, to keep and perform the
[54] obligations of the contract made by said constitutional amendment, as aforesaid, and the persistent hostility of said executive to said company, and the manifest intention of the State to repudiate her obligations under said contract, as shown by the passage of said joint resolutions and other acts and doings of said State and the people thereof, and for no other reason or cause, the said State bonds which had been delivered to said company became and were wholly discredited in the money markets of the country and among all capitalists, and the same were wholly unavailable in the hands of said company and its contractors as a means of raising money wherewith to proceed with work on said roads or pay the interest upon its bonds, and thereby the said State bonds in the hands of said company failed to be and were not within the intent and meaning of the said Constitution, a loan of the credit of the State or of her aid to said company, as aforesaid, and thus

*Record, pp. 69-71, folio 123.
†Ib. 71, folio 125.
‡Ib, folio 126.

the consideration of the said contract between said company and said State failed through the wrongful acts of the State, and by reason of said wrongful acts of the State the said company was unable and failed to pay the interest on its bonds held by the State [55] which became due February 1st, 1860.*

16th. March 6th, 1860, the Legislature passed the following act:

SECTION 1. Default having been made in the payment of interest on the bonds issued by the Land Grant Railroad Companies to and held by the State, and the Trustees under the deed or deeds of trust given to secure such bonds having neglected to foreclose the same, according to the provisions of such deed or deeds of trust, it is hereby made the duty of the Governor to foreclose the same, or to cause the same to be foreclosed, in conformity with the provisions of such deed or deeds of trust, and in accordance with law, [56] if in his opinion the public interest requires it.

SEC. 2. Upon a sale of the property, rights and franchises covered and embraced in such deed or deeds of trust, under such foreclosure hereinbefore mentioned, the Governor is hereby authorized and empowered, in his discretion, to bid off and purchase the same for and in the name of the State, and to make or cause to be made to the State of Minnesota, such suitable and proper conveyances as may be necessary.†

But no appropriation was made to enable the Governor to pay his bid if he made one.†

On the 10th of March, 1860, the Legislature proposed, and on the 6th of November following, the people adopted the following amendments to the Constitution:

"No law levying a tax, or making other provisions for the payment of interest or principal of the bonds denominated 'Minnesota State Railroad Bonds,' shall take effect or be in force, until such law shall have been submitted to a vote of the people of the State and adopted by a majority of the electors of the State voting [57] upon the same.

"The credit of the State shall never be given or loaned in aid of any individual, association, or corporation, nor shall there be any further issue of bonds denominated Minnesota State Railroad bonds, under what purports to be an amendment to Section ten (10) Article nine (9) of the Constitution adopted April 15th, eighteen hundred and fifty-eight, which is hereby *expunged* from the Constitution, saving and excepting and reserving to the State, nevertheless, all rights, remedies and forfeitures accruing under said amendment."‡

17th. On April 24th, 1860, the Governor without notice to the trustees, published an advertisement and notice of "foreclosure sale of the lands, properties and franchises of the Minnesota and Pacific Railroad Company," which, after reciting the execution of [58] the said trust deed and said supplement, contained the following:

"And whereas, the interest on the said bonds of said State issued to said companies became payable on the first day of December, A. D. 1859, and the said company having made default in the

*Record, p. 72, folio 127.
†page 73, †Ib.
‡Record p. 74.

payment *thereof*, the Governor of said State did, on the fifth of December aforesaid, as required by law, demand and request each of said trustees, in writing, to foreclose said trust deed, and to sell the property and franchises therein conveyed, pursuant to the terms of said trust deed; and whereas said Minnesota and Pacific Railroad Company have made default in the payment of the interest accruing upon such first mortgage bonds held by said State, and becoming payable on the first day of August, A. D. 1859, and whereas the sum of twenty-one thousand dollars is still due to said State and unpaid thereon; and whereas said trustees have utterly neglected and still do neglect to proceed to the foreclosure of said trust deed and the sale of the property and franchises [59] therein conveyed,"

"Now therefore, notice is hereby given that, pursuant to the power vested in me, in and by said trust deed and the supplement thereto, and by virtue of the power conferred upon me by law, I, as Governor and *Agent* of the State of Minnesota, will sell, or cause to be sold, at public auction, at the capitol, in the city of St. Paul, in the State of Minnesota, on the 23d day of June next, at ten o'clock in the forenoon of that day, all the properties, rights, privileges and franchises hereinbefore enumerated and described, and conveyed in and by said trust deed."

Which notice was signed by the Governor and the Attorney General.*

And the bill alleges "that at the time of the publication of said notice, and at the time of the so-called sale therein advertised and made on the said 23d day of June, 1860, no notice of any failure or default of said company, save and except the notices hereinbefore set forth, nor any request that the said trustees should make any sale or foreclosure, nor any notice or information of the passage of said act of March 6th, 1860, directing such sale, was ever given or made to or upon the trustees, and that it is untrue that the said trustees had refused, or that they were unwilling to comply with any legal demand to foreclose under their said trust [60] deed." †

On the 19th June, said Winslow, who had received thirteen of the bonds of the company (before the execution of said supplement) in payment of land as before stated, and who still owned a portion of them, commenced suit in equity in a court of Minnesota of general jurisdiction, and made the company, the trustees, and the Governor, defendants, for the purpose of enjoining said sale and having it adjudged that said supplement to said mortgage was null and void. A preliminary injunction forbidding the sale was issued and it and the summons personally served on both the Governor and Attorney General before the day of sale, and on the auctioneer at the commencement of the sale.‡

The writ was disregarded. All the property and things enumerated in the trust deed were offered "altogether, atonce, as one parcel or item." The Governor bid $1,000, on behalf of the State, and no other bid being immediately offered it was *all* struck off to the State in just *two minutes* from the time it was first offered.‖ Affidavit and certificate of sale were made and a deed of

*Record, pp. 76-7, folio 134.
†Ib. 77, folio 135.
‡Record, p. 77, folio 136.
‖Ib. folio 137.

[61] all said property was executed purporting to be an indenture "between the Minnesota and Pacific Railroad Company party of the first part and the State of Minnesota party of the second part,* and signed

"The MINNESOTA AND PACIFIC RAILROAD COMPANY."
By ALEX. RAMSEY,
Its Attorney in fact."†

These allegations are in the bill—"that neither at the time of said sale, or at any other time, was or has there been any consideration in money or otherwise advanced or paid by or on behalf of the said Governor of Minnesota, or by or on behalf of said State, for and on account of such sale or purchase, or pretended sale. And at the time aforesaid, and ever since that time, the said State held and retained the said twenty-five thousand dollars of the bonds of said company, delivered as aforesaid in excess of the amount of State bonds delivered to it. And your orators further show that said State had not at the time of such advertisement and sale paid any interest or sum of money on or on account of the said State bonds delivered to said company, nor had there been any request or demand that she or any of her officers should do so. And the said company had then in fact fully and completely exonerated the Treasury of said State from any advances of money for that purpose, and no such payment or advances have in fact ever been made by or on behalf of said State, or purchase last above described, or for or on account of said pretended conveyance so made by said [62] Ramsey to said State."‡

And "that at the time of said advertisement and so-called sale by said governor, a large number of said bonds of said company had been by it issued and delivered to parties other than the said State, in payment for the construction of its roads, and for right of way, and land for its use as hereinbefore stated, which bonds were then, and are still outstanding and unpaid. That the holders of said bonds had, and have no other security therefor, than the said deed of trust of July 31st, 1858. But the said State, in addition to the security of that deed, had also the exclusive lien and security of the said 240 sections of land, worth at that time, and which if offered for sale, would have brought much more than the sum claimed by said governor to be due from said company to the State; and also had the said $625,000 of said first mortgage bonds of said company, which also were then worth and might have been sold by said governor for much more than the said sum claimed by him, to be due the State. And before said sale, by said governor, the said company, and the said Winslow, one of the said bond-holders of said company, duly demanded of the said governor, [63] that he should before proceeding to sell the said property and assets in said Trust Deed enumerated, (which were the only security as aforesaid, of said bond-holders) offer for sale the 240 sections of land, upon which said State had such exclusive lien, and the said bonds held by the State, or so much thereof as might be necessary to satisfy his said claims in behalf of the State; but the said governor then and there refused so to offer for sale, or make any at-

*Ib. 79.
†Ib. 82.
‡Record, p. 82, f. 145.

tempt to sell said property and assets, upon which said State had such exclusive lien.'"

After the "sale," Winslow filed supplemental complaint, setting up sale and praying that it be adjudged null and void and set aside. The trustees "for said company and *all* the holders of its said bonds had appeared in said action before said sale and caused such ap-
[64] pearance to be entered of record therein."†

"And afterwards, John B. Sanborn and Charles C. Lund, who were holders of one of the aforesaid series of bonds of said company, prayed to be allowed to come in and defend said suit, and that they might be made parties defendant therein. And by order of said court made on the first day of December, 1860, said Sanborn and Lund were so allowed to defend, and were made parties defendant in said suit, and they filed their answer therein; and prayed that said sale and proceedings might be confirmed and adjudged valid.

And afterwards such proceedings were had, that the said cause came on to be heard upon the pleadings and proofs therein, whereupon on the 5th day of March, 1861, a decree was duly made and entered therein, of which the following is a copy:

"JAMES M. WINSLOW *against* THE MINNESOTA AND PACIFIC RAILROAD Company, Elon Farnsworth, Edward P. Cowles and William H. Welch, Alexander Ramsey, and John B. Sanborn and
[65] Charles C. Lund, partners as Sanborn & Lund.

"This action being brought to hearing for further directions on the report of William A. Spencer, Esq., referee appointed in said action to take the testimony and report the facts therein, and the report, together with the pleadings having been read, and George A. Nourse, as counsel for the plaintiff and Henry J. Horn and James Gilfillan as counsel for the defendants Sanborn & Lund, having been heard, and it appearing by the affidavit of George A. Nourse, attorney for the plaintiff, that more than twenty days had elapsed since the service of the summons in said action upon said defendant Ramsey, and since the appearance in said action of said defendants, Farnsworth, Cowles and Welch, and also since the filing of the complaint and supplemental complaint in said action, and that no answer, nor copy of answer, nor demurrer, nor copy of demurrer in said action have been served on the attorney for the plaintiff on the part of said defendants, Ramsey, Farnsworth, Cowles, or Welch, it is thereupon *ordered, adjudged and decreed*, and this court, in virtue of the power therein vested, doth *order, adjudge and decree* that the supplement to the trust deed mentioned and set forth in the complaint in this action, which supplement is also mentioned and set forth in said supplemental complaint (being the same marked schedule 'B' therein) be and the same is hereby vacated, set aside and declared void; also that the sale mentioned and set forth in said supplemental complaint of the property, lands and franchises of said defendant, the Minnesota & Pacific Railroad Company, be and the same is hereby vacated and set aside, and
[66] declared to be void and of no effect.

"Saint Paul, March 5, 1861.

"E. C. PALMER,
"Judge."

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*Ib. 83.
†Ib. f. 146.

"And said decree has never been vacated, set aside, reversed, or appealed from, but still remains of record in said court, and in full force and effect.

And the said supplement to the trust deed mentioned in the complaint and supplemental complaint in said action, "referred to in said decree, and thereby vacated, set aside and declared void, is the same instrument hereinbefore set forth of the date of November 27th, 1858. And the sale referred to in the foregoing decree and therein and thereby vacated and set aside, and declared to be void and of no effect, is the same sale by said Bronson, under the direction of said Ramsey, hereinbefore set forth."*

18th. On March 8, 1861, the Legislature passed "An act to facilitate the construction of the Minnesota and Pacific Railroad," which, among other things, enacted:

"SECTION 1. That the road, lands, property, rights, franchises, privileges and immunities, belonging or appertaining to the Minnesota and Pacific Railroad Company, prior to the sale and purchase thereof by the Governor, on the twenty-third day of June, one thousand eight hundred and sixty, on behalf of the State, and now *claimed or held* by the State, and all bonds and securities of the said company, held by the State, shall be, and are hereby, *released, discharged and restored to the said company*, free of all liens [67] or claims thereon held, by or on behalf of the State. * *

"SEC. 3. The said company shall, as a further consideration of this act, construct and put into operation, and fully equip for business, that portion of the main line extending from St. Paul to St. Anthony, on or before the first day of January next, in default of which all the rights and benefits conferred upon said company, by virtue of this act, shall be forfeited to the State, absolutely, and without any further act or ceremony whatever; and, in case the said company shall fail to construct the other [68] and further portions of said road and branch, as aforesaid, at the time or times aforesaid, the said company shall forfeit to the State, absolutely, and *without any further act or ceremony whatever*, all the lands, property and franchises pertaining to the unbuilt portions of said road and branch, and in either case, or in any forfeiture whatever, under the provisions of this act, the State shall hold and be possessed of all such lands, property and franchises so forfeited, *without merger or extinguishment, to be used, granted, or disposed of, for the purpose of aiding and facilitating the construction of said road and branch.*"†

It was further enacted in section 4, that the Company should pay the amount of legal costs and expenses of the aforesaid foreclosure sale, and another condition, both of which were per- [69] formed.‡

19th. Upon the passage of said last cited act, the Company resumed work on its roads, and made a contract with Winters, Harshman and Drake for the completion of that part from St. Paul to St. Anthony, according to section two of said act. And

*Record pp 83-4, f. 147-8.
†Record p. 85; f. 150-1.
‡Ibid 86-7; f. 152-3.

two locomotives and some passenger and freight cars were purchased, and about a quarter of a mile of track laid.

"But among other terms and conditions of said contract, it was stipulated and agreed that the said company should pay the said contractors for said work in one hundred and twenty thousand dollars of mortgage bonds upon said portion of its road, and seventy-six thousand eight hundred acres of the lands before conveyed to your orators and said Welch, [said trustees] in trust as [70] aforesaid.

"And in order that the same might be taken by said contractors free and discharged from such trust and lien, and that the said one hundred and twenty thousand dollars of bonds to be paid to said contractors might take precedence of said bonds issued under and secured by said trust deed, and be secured by a first and only lien upon that portion of said road, the said company undertook and promised the said contractors to procure through the action of your orators and said Welch, trustees as aforesaid, a foreclosure of the lien of said trust deed, and the sale by said trustees and the purchase at such sale, by some one in the interest and acting for said company and under its direction, of all the property, rights and franchises in said trust deed enumerated, and the conveyance of the same by such purchaser to the seven persons who then were the directors of said company, who should then organize as a new company and issue said one hundred and twenty thousand dollars of bonds, and convey said lands to said contractors as agreed as aforesaid. But your orators and said Welch, (said trustees,) refused to become parties to the consummation of such undertaking and agreement, and thereupon the said contractors refused to proceed further in the completion of said road, and threatened to take up and remove what iron had been laid, and to take away from the State that and other iron which had been procured and brought to Minnesota for laying said track to St. Anthony, to-
[71] gether with the said locomotives and cars.

"And thereupon in or about the month of September, 1861, the said company made another agreement or arrangement with the aforesaid contractors, to the effect that if they, the said contractors, would not remove said iron and locomotives, cars, &c., as aforesaid threatened, but allow the same to remain, the said company would, under the provisions and conditions of said section three of said act of March 8th, 1861, default and forfeit to the State all its lands, property, rights and franchises, and would thereupon, through its influences aided by the said contractors, procure from the Legislature of said State at its next session, the passage of an act granting all the same property and franchises to the same persons who were then the president and directors of said company and its principal stockholders, or to persons in their interest and under their influence, which legislative act it was agreed should be substantially and in effect such an one as the act which was afterwards in fact passed on the 10th day of March, 1862, and is hereinafter set forth. And that after the passage of such act such grantees from the State should and would organize
[72] as a new company and enter into a new contract with the said Winters, Harshman and Drake in the same terms substantially as the one hereinbefore stated. And for a further assurance to said contractors, and with a view of bringing more influence to bear upon such Legislature, the said company caused and procured a

penal bond in a large sum of money, to-wit, about twenty thousand dollars, to be prepared and executed by a large number of responsible and influential citizens of said State, the condition of which bond was to the effect that such legislative action as aforesaid should be procured and such new contract entered into with them, the said Winters, Harshman and Drake."*

20th. And on the 10th day of March, 1862, the Legislature did pass an act entitled "An act to facilitate the construction of the Minnesota and Pacific Railroad and to *amend and continue the act of incorporation relating thereto*," which, among other things, en-
[73] acted,

"SECTION 1. That all the rights, benefits, privileges, property, franchises and interests of the Minnesota and Pacific Railroad Company, *acquired* by the State of Minnesota by virtue of any acts, deeds, agreement or thing by the said company heretofore done or suffered, or by virtue of any *law* of the State, or constitution thereof, or of the former Territory of Minnesota, or by reason of any sale of the same or any part thereof by the Governor of the State, on the twenty-third day of June, eighteen hundred and sixty, and bid in and purchased for the benefit of the State, be and the same are hereby granted and transferred to Dwight Woodbury, Henry T. Welles, R. R. Nelson, Edmund Rice, Edwin A. C. Hatch, James E. Thompson, Leander Gorton, Richard Chute and Wm. Lee, their associates and successors, for the purpose and on the terms and conditions hereinafter in this act provided, free and clear of all claims or liens thereon, and from all liens and claims by or to the State of Minnesota, *except as hereinafter pro-*
[74] *vided.*"

"SEC. 2. All the rights, privileges, franchises, lands, property, and interests granted by the Territory of Minnesota to the Minnesota and Pacific Railroad Company, by the act of said Territory, approved May twenty-second, one thousand eight hundred and fifty-seven, entitled "An act to execute the trust created by an act of Congress, entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State;'" approved March third, eighteen hundred and fifty-seven, are hereby continued and granted to and vested in the said Dwight Woodbury, Henry T. Welles, R. R. Nelson, Edmund Rice, Edwin A. C. Hatch, James E. Thompson, Leander Gorton, Richard Chute and William Lee, and their associates and successors, with all the immunities, rights, property, benefits and privileges which the said The Minnesota and Pacific Railroad Company had, or might or could have, by reason of the passage of said act, free and clear of all claim and liens thereon, and free from all liens and claims of the State of Minnesota against the
[75] same, *except such as are retained by the provisions of this act;* and the said persons hereinbefore named, and their associates and successors, shall hereafter be known as the Saint Paul and Pacific Railroad Company, and by that name may sue and be sued, and have and exercise all the powers, rights and privileges which heretofore pertained to the said The Minnesota and Pacific Railroad

* Record pp. 87-8; f. 154-6.

Company by the act hereinbefore referred to, or by any other act or law; and that the persons hereinbefore named shall be the Directors of the said The Saint Paul and Pacific Railroad Company for one year, and until others are elected or appointed in their [76] places."*

* * * * * * * *

"SEC. 9. It shall not be lawful for said company to issue capital stock or make any mortgage or lien on said road-bed, superstructure, rolling stock or other property connected with said road, or make any sale of or create or give any lien or mortgage on lands granted to construct said road, for any debt, liability or obligation of the Minnesota and Pacific Railroad Company, or for any debt, liability or obligation hereafter to be incurred by the said Saint Paul and Pacific Railroad Company, except for the *bona fide* purpose of constructing, completing and equipping said road or branch, *until* after it shall have been completed for the running of cars thereon to a point opposite St. Cloud, in the said branch, and to the west side of range thirty-one on the main line of said road; *Provided*, That no *lien, mortgage or other incumbrance* shall be made on any of the *uncompleted* roads or lands, after the completion of the road to St. Cloud, except for the *bona fide* purpose of [77] constructing said uncompleted roads."†

* * * * * * * *

"Sec. 12. That no execution issued or to be issued upon any judgment now or *hereafter to be rendered* against the Minnesota and Pacific Railroad Company, on any liability incurred prior to January 1st, 1862, shall be *levied* upon any of the lands, property or franchises by this act granted to the said Saint Paul and Pacific Railroad Company, *unless* specially directed to make such levy by a decree or judgment of the court; nor shall any injunction to stay or impede the construction of the railroad to be constructed or completed under the provisions of this act by said Saint Paul and Pacific Railroad Company be allowed or issued, except upon complaint filed and adequate security by injunction bond given, nor until after the service of the notice of the application therefor upon the said company, at least sixty days prior to the time of such application, which application must be heard at some general term of the court in the proper county. Such application shall be heard upon the complaint and answer, and determined thereon according to the prac- [78] tice and course of decisions in like cases."‡

"And six of the persons who are in said act named as the grantees of the State of 'all the rights, privileges, franchises, lands, property and interests granted by the Territory of Minnesota to the Minnesota & Pacific Railroad Company by the act of said Territory approved May twenty-second, one thousand eight hundred and fifty seven,' were the president, directors, and the controlling managers and holders of a large and the controlling majority of the stock of and in the said Minnesota & Pacific Railroad Company, from the time of its organization up to and at the several times the said company made the aforesaid arrangements with the said Winters, Harshman and Drake, and when it made default and suffered forfeiture, as aforesaid, under said act of March, 1861.

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*Record, pp. 88–9; f. 157-8.
†Record, p 92, folio 163.
‡Ib. 92-3, folio 164.

"And on the next day after the passage of said act of March, [79] 1862, to wit, on the eleventh day of said month, the persons named in said act, as grantees of the rights, franchises, &c., of said Minnesota & Pacific Railroad Company met at St. Paul, in said State, and organized, under said act, as a Board of Directors of the St. Paul and Pacific Railroad Company by the election as president thereof of the same person who had been president of said Minnesota & Pacific Railroad Company from its organization to that time, and on the same day made and entered into a contract with Winters, Harshman and Drake, in the terms and to the effect before promised by said Minnesota & Pacific Company as hereinbefore stated."

"And, after that, the officers, directors and stockholders of said Minnesota & Pacific Railroad Company ceased holding any meetings, or having any place of business, or doing any business as or in the name of the Minnesota & Pacific Railroad Company, and [80] denied its longer existence."

"And all the stockholders of and in the said Minnesota & Pacific Company, who were not named in said act of March 10th, 1862, as grantees, as aforesaid, had, without other consideration, full paid stock voted and delivered to them in and by the said St. Paul & Pacific Company, equal in amount to the amount of their paid up subscriptions to the stock of said Minnesota & Pacific Company, so that the stockholders in the St. Paul & Pacific Company became and were identically the same as the stockholders of the Minnesota & Pacific Company."

And at or about the same time the said St. Paul & Pacific Railroad Company made, executed and delivered to said defendant, Walter L. Cutting, a trust deed, purporting to be a first lien upon that portion of said road from St. Paul to St. Anthony, to secure the said one hundred and twenty thousand dollars of first mortgage bonds so as aforesaid agreed to be paid to said Winters, Harshman and Drake, and afterwards said bonds were issued and paid to said Winters, Harshman & Drake, and are still out- [81] standing.*

"And your orators further show that the said persons named as grantees in said act of 1862, are the very identical persons who, as officers, managers and directors of the said Minnesota & Pacific Railroad Company and controllers of its management and affairs, were then, as ever since its organization they had been, in the exclusive actual possession, occupancy, use, enjoyment and control of all and singular the said lands, properties, rights, interest and things of every description, and the franchises, common seal, books, accounts and records of the said Minnesota & Pacific Railroad Company, which said actual possession was never suspended or interrupted, and being so in possession and occupancy, upon the passage of said act of 1862, they continued in such possession; but they, their successors and assigns thereupon, and founded upon, and claiming under said act of 1861, and the operation of the forfeiture therein provided for, and the said act of 1862, and the operation of the grant therein made, set up and assumed and claimed, and do now set up, assume and claim that under and by virtue of the operation of the *aforesaid forfeiture* and acts they took and held, and do now hold, all and singular the said rights, prop- [82] erties, interests, things and franchises, free, clear and alto-

*Record pp. 93-4, folios 165-6.

gether discharged of and from the liabilities, debts and obligations of contract incurred and entered into by said Minnesota & Pacific Railroad Company, through and by themselves (the said grantees) as aforesaid prior to that time, and especially free, clear and discharged of and from the liabilities, trusts and lien of the aforesaid deed of trust of July 31st, 1858, and of and from the claim and rights of the bondholders thereunder."*

21st. It is alleged that in addition to the six hundred and twenty-five bonds delivered to the State, four hundred and thirty-three of the same series, with coupons annexed, were by the company paid out and delivered to sundry persons in consideration of money by them loaned to it, for the construction of said roads—lands by them conveyed to it for the right of way, and use of said roads—work, labor and materials by them rendered, done, performed, and furnished in the grading, bridges, culverts and partial completing of sixty-two and one-half miles of its said road, being the same prop-
[83] erty included and described in said act of 1862; which said bonds, with all, or nearly all said annexed coupons, together with the interest upon said coupons, from the time the same became due and payable, remain wholly unpaid, and payment thereof, or of any part thereof, is wholly neglected and refused, though the same has been often and long since demanded, and which interest on said bonds and coupons so remaining due and unpaid amounts to more than two thousand dollars, to wit, to the sum of several hundred thousand dollars.†

It is charged that the defendants had "full notice in fact, as well as in law, of said trust deed of July, 1858, and the claims of bondholders thereunder."‡

The bill prays that it may be adjudged and decreed that the said deed of trust of July 31st, 1858, is a valid instrument, in full force and effect and is a valid and subsisting lien *first and prior to all other liens and incumbrances upon all the lands, property, rights, interests, franchises and things therein enumerated and described*, and for an accounting and for the aid of the court to enforce the lien
[84] and payment, &c.‖

The defendants severally demurred,§ and the demurrers were sustained and the bill dismissed.

The complainants prayed an appeal to this court, which was allowed.¶

No abstract is attempted of the opinion of the court below, lest injustice might be done. It is printed in the record, pages 121 to 132.

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* Record 94, folios 167 68.
† Ib. 96, folio 171. 172
‡ Ib. 97, f. 174.
‖ Record, 102, 103, folios 183-6.
§ Ib 110, 120.
¶ Ib. 132.

ASSIGNMENT OF ERRORS.

The Court below erred:

1st. In holding that under the act of Congress the Legislature could not authorize the trust deed set forth in the bill, in advance of the construction of the road, so as to give a lien on all the lands appertaining to such road, *as against the State and subsequent grantees of the State* "who actually built the road and earned the land," with notice of said trust deed. (See Argument, post 31–4.)

2d. In assuming, *as a fact*, that the road was actually and wholly built, and the lands actually and wholly "earned" by said subsequent grantees, and that the same was done without the aid and expenditure of money advanced by the original stockholders, and borrowed under said trust deed and upon the security thereof. (Post 34–6.)

3d. In holding that the State of Minnesota, or any one but the United States, could take advantage of the conditions of the Congressional grant, or be heard to object that said trust deed was not authorized by the act. (Post, 36.)

4th. In holding (in effect) that the Legislature could not authorize such trust deed in advance of construction of road and acquisition of other property than that derived through the United States, so as to be a lien upon the road, when constructed, and upon said other property when acquired. (Post, 37.)

5th. In holding that there was, or could be, any forfeiture, under or by force of the *constitutional amendment* in any way when taken in connection with the facts stated in the bill. And in holding that in any event title could be acquired by *such* forfeiture without *judicial process and judgment.* (Post, 37–46.)

6th. In holding that if there were such forfeitures, the trusts and lien of said trust-deed, and the title of the trustees, and all the rights and equities of the bond-holding creditors, were subject to said forfeitures, so that they could not be enforced against the lands of the Congressional grant, nor against the

franchises granted by the State, nor against the tolls and income of the railroad, nor against any other property described in the deed, and *not even against the property which the company bought and paid for with the very bonds issued under the deed.* (Post, 46–51.)

7th. In holding that the foreclosure proceedings set forth in the bill did not bar any title or claim by forfeiture under the constitutional amendment. (Post, 51–2.)

8th. In holding that the act of March 10th, 1862, was intended as an enforcement, or taking advantage of the condition and forfeiture of the *constitutional* amendment. (Post, 52–3.)

9th. In holding that said act of 1862 created a new corporation, and that the St. Paul and Pacific Company is not the same corporate entity as the Minnesota and Pacific Company, and so liable for its debts. (Post, 53–5.)

10th. In holding that it was intended by said act to avoid the lien of said prior trust deed, or the debts before that time due to the bond-holders thereunder, *for money loaned for and used in the construction of said road*, with notice of the fact to all the world; and that the Legislature could give to the act such effect. (Post, 55–8.)

11th. In holding that for any cause presented by the record the said trust deed of July, 1858, is not a valid and subsisting charge and lien, and the first lien upon the property, rights, and franchises therein described to secure the payment of the bonds issued thereunder. (Post, 58–72.)

APPELLANTS' POINTS AND AUTHORITIES.

FIRST.

The court below erred, in holding that under the act of Congress the Legislature could not authorize the trust deed set forth in the bill, in advance of the construction of the road, so as to give a lien on all the lands appertaining to such road, as against the State and subsequent grantees of the State "who actually built the road and earned the land" with notice of said trust deed.* Because—

(1) The said lands were granted "to aid in the construction of the road," and being mostly wild lands in an unsettled part of the country, they could not be used to materially aid such construction, except as a basis of credit and security upon which to borrow money for that purpose; and Congress knowing this, and intending the grant to have a beneficial operation, must have intended such use. Because the motive was to aid those who would construct a railroad through a country of such extent, in advance of its settlement, and so promote the national good by stimulating its hasty settlement; it must have been expected that the grant would be used in that way, which alone would be available to the end in view, and which is the way all previous grants of the kind had been utilized.

All previous grants to aid in the construction of railroads and canals, covering a period of about thirty years, had been made available and used in this way.†

The policy of aiding *railroads* by a grant of public lands was inaugurated in 1850 in the case of the Illinois Central Railroad, and the example was followed in many instances to other States prior to the Minnesota grant. All these prior grants were upon the same conditions and with the same restrictions. The provisions in question are all copied from the Illinois grant, and the notorious practice under these former grants, was to pledge or mortgage the lands in advance of construction as security for money borrowed for the purpose of construction. Congress must be presumed to have known this notorious public fact, and therefore in making the

*Record, pages 121, 130.
†See Trustees of Wabash and Erie Canal Company vs. Beers, 2 Black., 448.

grant to Minnesota in the same words, without addition or qualification, must have intended to permit the same use.

(2) The charter of the Railroad Company which authorized this trust deed, was enacted by the *Territorial* legislature, acting under an act of Congress which provided that "all laws passed by the legislature shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect."* This act and charter which expressly authorized the company to make such trust deed† was not disapproved by Congress, and therefore may be considered in some sense as a law of Congress, or at least as having its assent.

(3) The act of Congress of March 3d, 1871, authorizing a change of part of the very line for which this grant was made is a construction by Congress of the act making the grant, and shows that it was understood by Congress as authorizing the encumbering of the lands in advance of the construction of the road, for it provides‡ "that proper releases shall be made to the United States by said company of all lands along said abandoned line," which abandoned line was part of the one endowed by the original grant, and was not only uncompleted, but *uncommenced*. And a like legislative construction is in the act of March 3d, 1873, in the recital that the lands granted to Wisconsin, with the same restrictions and conditions, were "vested in" and belonged to a railroad company the grantee of the State, though the road was unconstructed.‖

(4) If by the true construction of the act it was lawful to mortgage or deed the lands in trust as a means of borrowing money with which to construct the road, and to secure the lender; then it follows that the instrument is effectual as such security, whether the road was wholly completed with that money or not; for it could not be expected that a mortgage would be available or bring any money, if it were understood that the lender and first mortgagee was to lose all claim to the security in case the company after using his money to pay for the grading of the road, should borrow of another the money to pay for the laying of the iron on it. And that in such case the *last* lender and junior mortgagee, shall not only have the *first* lien, but the whole security; on the plea that he "built the road and earned the lands." Under such

*9 Statutes at Large, 405, § 6.
†Abstract ante pages 3 and 4, folios 5 and 9 Record p 8 f 15 & 14 f 24
‡16 Statutes at Large, 588.
‖16 Statutes at Large, 634.

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ruling as this, no man must be the *first* to lend money to a railroad company, unless he lend enough to fully complete the road; and even then he would not be safe, unless he got the contract for the construction; for otherwise, the company might fail to complete it with his money, and borrowing of another, he might find his loan turned into a gift outright. No one would expect to borrow on such security.*

(5) But it is not material what is the true construction in this regard of the act of Congress; for, "the United States are not complaining and no other party has a right to complain."†

"Unless forbidden by some *positive* law, contracts made concerning the public lands, by those having possessory rights therein, (which confessedly the railroad company had in this case,) concerning the title to be acquired in future from the United States, are valid as between the parties to the contract, though there be at the time no act of Congress by which title may be acquired, and though the Government is under no obligations to either of the parties in regard to the title."‡

(6) If in this case the lenders did take the risk of losing their security by reason of a forfeiture or reversion claimed by the United States; they did not take the risk of losing it by reason of a forfeiture enforced by the *State;* because such title as the State might acquire upon such forfeiture would be subject to the lien,‖

And because the State especially estopped herself by the 21st section of the act of incorporation§ from claiming any of this trust fund adverse to the trust. That section amounted to an invitation by the State to the whole world, to lend money for a work of public interest—upon faith in the security thereby authorized to be given for their loan, and when the company in pursuance of that authority borrowed money on the faith of that security and faith in the act of the legislature, a contract at once arose between the lenders and the State, that the State would not withdraw any of the trust fund or impair the lenders' security.¶

It is not necessary in order to maintain the lien of this trust deed on the lands granted by Congress—as against the State and

* See Galveston Railroad vs. Cowdrey, 11 Wall., 459, 481; 12. Ib. 362-5. Dunham vs. Railroad Company, 1 Ib. 254-266

†Baker vs. Gee, 1 Wall., 333-7. See also 2 Blackstone, 155. 4 Kent, 127. Nicoll vs. N. Y. and Erie Railroad Co., 2 Kernan, 121-140.

‡Lamb vs. Davenport, 18 Wall., 307.

‖2 Blackstone, 267; ib. 275; 4 ib. 381-4; 4 Kent, 427

§Abstract, p. 4, folio 9. Record p. 14

¶Curran vs. Arkansas, 15 How., 304; Hawthorn vs. Calef, 2 Wall., 10; Van Hoffman vs. City of Quincy, 4 Wall., 535; Woodruff vs. Trapnal, 10 How., 190; Barings vs. Dabney, 19 Wall., 9; and Dartmouth College Case.

her subsequent grantees—that either the company or the State owned the lands at the time of making the deed; for whatever may be the law as to private persons, the State, in virtue of her sovereignty, can grant all her expectant or prospective interest in any land, and having done so in this case by the 16th section of the charter,* she and her subsequent grantees are estopped from denying her title or that of her grantee, the railroad company.

But again—if they have no other force and effect said sections 16 and 21 operate as a lawful and sufficient *power* to create this lien; for, unquestionably, if the State had chosen to execute the trust created by the act of Congress, *herself*, and had borrowed the money for the construction of the road in her own name, giving as special security, a like deed of trust made by one of her executive officers, acting under legislative authority like that conferred on the Company by said 21st section—such deed would have been good as against the State and her grantees, though the officer who executed it had no title to the land. It would be enough to bind the State, that *she had authorized* him to make it. The President does not own the lands he conveys by patent; but the United States are barred and estopped to the extent of the authority given by act of Congress, and would be equally bound if the authority had been given to a corporation of their own creation. So in this case the State is bound by the trust deed made by the R. R. Co., the same as if it had been made by one of her officers under like legislative authority; *because, she created the corporation and expressly authorized it to make the deed.* The corporation was in this, as in some other respects, an officer of the State and performed a public function.†

It is to be noted that this point of objection of the learned Judge does not go to any thing but the lands granted by Congress; and he excepts of those lands, 120 sections, which should be 240, as in this case there was a main line and a branch, and though the State had, at one time, the first lien upon these 240 sections,‡ she gave it up by the act of 1861, thus making the lien of this trust deed first upon it.‖

SECOND.

The court erred, in assuming *as a fact*, that the road was actually and wholly built, and the lands actually and wholly "earned" by the said subsequent grantees; and that the same was done

*Abstract ante, p. 3, folios 5-6.
†This point will be further argued under other heads.
‡Abstract ante, p. 7, folio 15.
‖Abstract—p. 25, folios 66-7.

without the aid and expenditure of money advanced by the original stockholders, and borrowed under said trust deed and upon the security thereof.* Because:

The bill alleges and therefore the demurrers admit—

(1) That the charter and corporate franchises, including the franchise to be a corporation—the franchise to build and operate the road and "to establish such rates of toll and charges for the conveyance of persons and property upon the said railroad as they (the board of directors) shall from time to time determine, and to change the same and to levy and collect the same for the use of the company"—the franchise to take private property by condemnation†—the franchise to take and hold the very lands in question‡—the franchise to make the subsequent mortgages‖—the exemption from taxations§—all which franchises, income and tolls, are by the trust deed and under express authority of the legislature made part of the trust fund for the security of the bonds issued under said deed¶—these portions of the trust fund were all "earned" and preserved by the money advanced by the original stockholders, and borrowed from the holders of the bonds secured by this trust deed.**

(2) That the surveys and locations in 1857, of the whole Main Line from Stillwater to Breckenridge, and the branch from St. Anthony to Crow Wing, (about 350 miles in all) and the proceedings by which the lands (about 1,340,000 acres) appertaining to the lines so located, were procured to be allotted to the company according to said locations, and reserved from sale and pre-emption††—all this was done by money borrowed of these bondholders.‡‡

The benefits derived from this labor and expenditure were; First: the precise lands to be received were ascertained and defined; for though the grant was *in presenti*, the *locus in quo* was afloat and undeterminable except by said definite location of the roads; Second: they were saved to the company from purchase and pre-emption by others; Third: the lands secured to the company were of greater value than those which could have been secured by the company if the surveys and definite locations had been postponed

*Record, pp. 122, 127, 129, 130, 131. Record p 5-7-9 folios 10, 13, 16, -19
†Abstract, p. 3, folio 4.
‡Ib., p. 4, folio 8. —— " " 11+12 (Dec 16)
‖Ib., folio 9. —— " " 14
§Ib., folio 8. —— " " 13 f-28
¶Ib., pp. 9-10, folios 21-23. " " 34-5- f 60, 61, 62
**Ib., p. 5, folio 10.
††Abstract page 5, folio 10. Record p 25-6 f 43-4
‡‡Ib. pages 5-6, folio 11; page 9, 20; Ib. page 30, folios 82-3.
Record p 26, f 45- p 34, f 60; p 96, f 171-172

until others had time to purchase and pre-empt the best in quality and the nearest to settlements.

The grant was thereby made to take immediate effect to the extent of such definite locations and allotments. Without this, no lands would have enured to the company or been earned by any one, and the longer it was delayed the less would be the value of the grant.

(3) The lands purchased of Winslow, with thirteen of these bonds, were not "earned by the subsequent grantees" alluded to by the learned judge,* nor were any of the lands or other property acquired prior to 1862 from other sources than the United States.†

(4) The grading of sixty-two and one-half miles of road, with bridges and culverts constructed, &c., ‡ was not the work, nor done at the expense of said subsequent grantees, nor was what they did in relation to it—namely—laying down the iron rails, &c., taken alone, the building of the road or the earning of any lands. Without a roadbed the iron would not be a railroad; and this necessary and fundamental work,—the roadbed, culverts, bridges, &c., for sixty-two and one-half miles was done by and at the expense of the stockholders and the holders of the bonds under this trust deed of July, 1858. Therefore, the said franchises and property should be held charged with the trust, for "*that should make satisfaction which has received the benefit.*"

THIRD.

The court erred in holding that the State of Minnesota, or any one but the United States, could take advantage of the conditions of the Congressional grant, or be heard to object that said trust deed was not authorized by the act‖—Because—

(1) The United States was the grantor, and conditions can only be reserved for the benefit of the grantor and his heirs;§ and the reason is, that the grantor may waive the condition, and will be held to have done so, unless he have made re-entry or its equivalent,¶ and

(2) Because, the said trust deed in all its terms and extent was expressly authorized by the State in and by the said 21st section

Record p 59 & 104

* Abstract, page 15, folio 38. As to Winslow, this is a mortgage back for the purchase money.

† Ib. page 5, folio 10; Ib. page 18, folio 48; Ib. folio 69 Record p 24, 5, 6

‡ Ib. folio 48. Record p 64

‖ Record, pp 122, 130, 131.

§ 2 Blackstone, 155; 4 Kent, 127; Baker vs. Gee, 1 Wall, 333; Smith vs. Sheeley, 12, Ib. 358; Lamb vs. Davenport, 18 ib. 307; Nicol vs. N. Y. & E. R. R. Co., 2 Kernan, 121, 140.

¶ Same cases.

of the act of incorporation, she became *estopped* from disputing its validity. And when money was loaned upon the faith of it a *contract* arose between the lenders and the State, that the State would not withdraw any of the trust fund to their disadvantage or do any act to impair their security.* And the subsequent grantees of the State are estopped in like manner, for they not only had notice, but took without paying anything† for said franchises, road-bed, and property acquired before the act of 1862.‡

FOURTH.

The court erred by (in effect) holding that the legislature could not authorize such trust deed in advance of construction of road and acquisition of other property than that derived through the United States, so as to be a lien upon the road when afterwards constructed, and upon said other property when afterwards acquired. Because:

It is settled law, that a railroad mortgage, if authorized as this was, although made before the road is built, attaches itself thereto as fast as it is built, and to all property covered by its terms, as fast as it comes into existence, under the charter of the company.‖

FIFTH.

The court erred in holding that there was or could be, any forfeiture, under or by force of the *constitutional amendment* in any event; and more especially when taken in connection with the facts stated in the bill. And in holding that in any event title could be acquired by *such* forfeiture without *judicial process and judgment*.§ Because:

[1.) To maintain such holding, the provision in the constitutional amendment which is relied upon, namely—that fifty miles of road be completed on or before the last day of Dec., 1861, must be treated as a condition *in deed*,¶ which may be taken advantage of by re-entry or its equivalent legislative act, and the grantor become thereby seized of *his* first estate.** But the constitutional amendment *is not a deed* or its equi
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*Curran vs Arkansas, 15 How 304-22, and other cases
†Abstract p. 27, 30, folios 73-74, 83. Record pp. 88
‡NOTE—This point is further considered, *post*.
‖See Galveston Railroad vs. Cowdrey, 11 Wall. 559, &c
ham vs. Railway Co. 1; Ib. 254, &c.
§Record, page 122-131.
¶Litt. Sec. 325, 2 Bl. Com. 153, 4 Kent 120, 192, 2 Kernan 121
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Record p 59 & 104

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† Ib. page 5, folio 10; Ib. page 18, folio 48; Ib. folio 69 Record p 24, 5, 6

‡ Ib. folio 48. Record p 67

‖ Record, pp 122, 130, 131.

§ 2 Blackstone, 155; 4 Kent, 127; Baker vs. Gee, 1 Wall, 333; Smith vs. Sheeley, 12, Ib. 358; Lamb vs. Davenport, 18 ib. 307; Nicol vs. N. Y. & E. R. R. Co., 2 Kernan, 121, 140.

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[1.) To maintain such holding, the provision in the constitutional amendment which is relied upon, namely—that fifty miles of road be completed on or before the last day of Dec., 1861, must be treated as a condition *in deed,*¶ which may be taken advantage of by re-entry or its equivalent legislative act, and the grantor become thereby seized of *his* first estate.** But the constitutional amendment *is not a deed* or its equivalent legislative grant; therefore its conditions can not be *conditions in deed.* It is

*Curran vs Arkansas, 15 How 334-22, and other cases cited, *post.*
†Abstract p. 27, 30, folios 73-74, 83. Record pp. 88-9 & 96 & 172 & 197 & 174
‡NOTE—This point is further considered, *post.*
‖See Galveston Railroad vs. Cowdrey, 11 Wall. 559, &c.—12, Ib. 362. Dunham vs. Railway Co. 1; Ib. 254, &c.
§Record, page 122-131.
¶Litt. Sec. 325, 2 Bl. Com. 153; 4 Kent 120, 1°2, 2 Kernan 121
**Litt. Sec. 325, 347; 2 Bl. Com. 154; 4 Kent 126-7. (Note.)—He is not seized of the estate of a stranger like Winslow.

not anything in the nature of a conveyance. It can not have created an estate upon condition, because it did not create any estate at all. It neither creates, enlarges or confirms title or estate of, in, or to any thing. The Railroad Company is not, by this amendment, the grantee of any of the things to be forfeited. None of the things enumerated, described and mortgaged by the Railroad Co., in and by our trust deed, came to the Company by or through this instrument. It is the source of title to none of them. All and singular, they were acquired through, and held under other instruments, some prior to it, others subsequent. This condition is not attached to and does not accompany the grant of any of the things upon which it is to operate by forfeiture. If the Company had had nothing else to rely on for title, it would never have been the owner of franchises, lands or other property. And because this constitutional amendment is not a deed, or the source of title, and the condition did not accompany the grant, it is not a condition in deed, and could not be taken advantage of by re-entry or legislative act; and the court below misapplied the law, and was in error in holding that it could be.*

For the same reasons it is not a condition in law in the sense in which that is an *implied* condition annexed to a grant.†

It is not a condition in law in the sense in which that is a condition which the State in its own right may annex to any or all property which a party has or may acquire, whether from the State or other source, *ex. gr.* condition of forfeiture for crime or negligence,‡ because in this case the charter of the company was a prior contract with it, the obligations and penalties of which could not be changed to its disadvantage without its consent. The authority of the people of Minnesota was insufficient without its assent to add this new obligation and condition to the original contract between the State and the Company.‖

If it were a condition in law, in this sense, the forfeiture would not avoid the incumbrance.§

What this constitutional amendment and this provision for forfeiture, &c., were, is this :—

The said amendment was a *contract of lending*. The thing to be loaned was the credit of the State. The security to be; *first*, a pledge of the net profits of the roads; *second*, a conveyance in

*Litt. Sec. 325; 2 Blackstone 154; 4 Kent 123.
†Litt. Sec. 378; 2 Blackstone 153; 4 Kent 120; Davis vs. Gray, 16 Wall, 223.
‡2 Blackstone 267, 420; 4 Kent 426.
‖U. S. Constitution; Art. 1, Sec. 10.
§2 Bl. Com. 421, 4; Ib. 381, 387; 4 Kent 427.

trust of the first 240 sections of land to be received under the Congressional grant; and *third*, a portion of the first mortgage bonds of the company to be issued under the 21st section of its charter.

So far; this contract does not differ materially, from ordinary contracts for lending, and taking security or indemnity against loss on account of the loan; and what is afterwards added, that is, the provision that in consideration of the loan as agreed upon, the company shall construct its roads at a specified rate of progress, or forfeit its franchises, road and property ; is not for the purpose of further security and indemnity against loss on account of the loan; because, if the company should build the road according to this provision it might then wholly neglect and refuse to pay or provide for the interest on either its own, or the State bonds, and the State could not for that reason, enforce such forfeiture, but would in such case be left solely to her remedy on the security for the loan, that is, the pledge of net profits, the first 240 sections of land, and the first mortgage bonds of the company, received in exchange for her own ; therefore this provision is not security for the loan. But it is a *penal* provision *in terrorum*, to secure an end which the people of Minnesota were in great haste for—that is, the immediate resumption and early completion of the construction of these roads. The financial revulsion of 1857 bore with peculiar hardship on the people of this new State. They had been very imprudent, and had acted upon the most extravagant views of the then present, and future value of property. Most of them had notes outstanding with the stereotyped clause, "with interest at the rate of three per cent. per month until due, and five per cent. per month after due until paid ;" and their new homes were mortgaged to secure the payment of their debts with such rates of interest. They who will not take notice of this fact of history, will not understand this constitutional amendment.

The motive, the intent, the purpose of this amendment, is well expressed in its commencement, "for the purpose of *expediting* the construction of the lines of railroad," &c. Through this and its necessary accompaniment, an influx of foreign capital, relief was sought. Hence ; first, the provision for the loan of the credit of the State, and then this contract of *penalty* added, and in the same spirit and with the same hopes of its effect with which all *penalties* are inserted in contracts—to impel, by fear.

At best; this penal provision for forfeiture, is nothing but an *executory* agreement by the R. R. Co. with the State, made in express consideration of the precedent *execution* of an executory agreement by the State; to the effect, that in consideration of the

precedent performance by the State of the thing by her agreed to be performed as such consideration, namely, "the loan of State credit herein (therein) provided," the company would "expedite" the construction of its road so as to have fifty miles completed prior to 1862; or in default thereof, the State might enforce (in a way not stated and therefore we say only *by judicial process*); a forfeiture of all the property of the company, *from whatever source derived*,* none, however, being derived through this instrument.

This was not security, or indemnity, against loss on account of the loan; but it was security for *extra* diligent user of the franchises, and indemnity for non-*extra* diligent use of them; or rather, it was an inducement or something to impel the company through fear of this penalty, to make most diligent use of its franchises.

The purpose was to get the franchises and property, in case it should prove necessary, into more diligent and capable hands. But this purpose did not require that they should be taken and held free of charge and lien, for the work already done.

We suppose, if the company had made this or a similar agreement with a party other than the State; or if one citizen should agree with another, of whom he had contracted a loan and given security for the loan, that in consideration of such loan, he would within a time specified do some act of benefit to the lender; or in default, forfeit all his personal rights, and property, from whatsoever source derived; such last provision would be held void for its character as a *penalty*. But in this case, one of the parties was the law-making power, and for that reason may be an exception to the rule so far as to enforce the penalty. But still, the forfeiture being for non-extra diligent user of the franchises, and no special remedy or mode of taking advantage of it being provided; the State was left to the common remedy in all cases of non-user; that is *judicial process* and judgment. The forfeiture could not be enforced in any other way.† Indeed, so far as the franchises are involved, this condition is similar, except that it does not accompany the grant of them; to the *implied* condition in every charter to use them diligently, and upon breach of which the State may seize them by, and *only by judicial process*, and subject to all *liens* if not to all debts.‡

At common law, and under the statutes of Minnesota cited below, the court would be the judge of what degree of negligence of the use of the franchises, would be sufficient *non user* to justify a seizure by the State. It would rest in the sound discretion of

*Abstract ante, p. 7, f. 17. Record p 25-30

† Davis vs. Gray, 16 Wall., 232. 223

‡ Curran vs. Arkansas; 15 How. 304, Mumma vs. Potomac Co., 8 Pet. 281.

the court. By this provision the court is deprived of this discretion. The parties have agreed what shall be considered sufficient degree of negligence or *non user*. This and nothing more. All else—the mode of procedure, and the effect upon prior incumbrances are left untouched and unchanged.

But a further and important point in this connection is this; namely, long before, at the time of, and ever since, the making of this provision of forfeiture; which is itself silent as to the mode of its enforcement and the effect upon liens; the General Statutes of Minnesota provided a form of "civil action" by the Attorney General in the name of the State, on leave granted by the Supreme Court or any judge thereof, for the purpose of vacating the charter or annulling the existence of a corporation, other than municipal, whenever such corporation

"1. Offends against any of the provisions of the act or acts creating, altering or renewing such corporation; or,

2. Violates the provisions of any laws, by which such corporation forfeits its charter by abuse of its powers; or,

3. Whenever it has forfeited its privileges or franchises by failure to exercise its powers; or,

4. Whenever it has done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises."*

Provision is made by this Statute for trial and judgment of forfeiture—*and furthermore for the distribution of the property of the corporation among its creditors, even for those who have no lien.* The rights of creditors to payment out of the assets are not only recognized, but going still further the State relieves them of all trouble and expense of suit. It is made "the duty of the attorney general immediately after the rendition of such judgment (of forfeiture) to institute proceeding for that purpose," the distribution of assets among creditors. †

The learned Judge, in his opinion, makes the point that "the forfeiture provided for in the constitutional amendment, (the provisions of which had been accepted by the Company) are older than the plaintiff's mortgage and underlie the rights of the creditors secured by it."‡ Yes; but the above cited Statute is still older.

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*Minn. Rev. Stat. of 1851, Chapt. 80, pages 410-11. (Chapt. 80, page 618 Revision of 1858.)

NOTE—If the provision of the constitutional amendment in question, has any force at all, it amounts to an agreed and accepted modification of the charter or an agreement for surrender.

†Ib. page 412, Sec. 17.

‡Record page 131.

And because the said amendment is silent, as to the mode of enforcing the forfeiture, and its effect on creditors, this Statute is operative upon those matters and the provisions of the Statute *underlie the rights of the State.* And without this Statute, the common law would supply that upon which the amendment is silent, and require judicial proceedings,* and save the liens of the creditors as argued in our next point.

But conceding that this provision for forfeiture was of the nature of condition in deed, and could be taken advantage of without judicial action, it still remains true that the State lost the right to it and *barred even the judicial remedy, by her own illegal acts and first and continued breach of the contract which created the condition.*

This provision was "in consideration of the loan of State credit," as said amendment provided.† This required that the State before claiming the penalty, should perform her *part of the agreement* that is, loan her credit in manner, form, and *substance* as was expressed and intended in the contract. This was condition precedent. The gist of this amendment, was the agreement of the State to help the company borrow money for the construction of the road. The necessity and reason of the contract was that the credit of the company was not strong enough at that time, for borrowing enough money to build the road; and so the State undertook to strengthen the credit of the company by a loan, and the union, of the credit of the State with the credit of the company. The form was by an exchange of State bonds for bonds of the Company. The company wished to raise money by the sale of its bonds. The State encouraged others to buy by taking a large number of them herself, but paying in her own bonds instead of cash. This nature of the contract required that the State should *do nothing to impair the credit and value of her own bonds.* It was of the essence of the contract that they should represent her credit, that is, that they should have all the value in the market which bonds of the State of Minnesota would have, upon confidence that she meant to see that principal and interest were paid at maturity—otherwise this exchange of bonds would not be what was stipulated, "a loan of the credit of the State." She was therefore not at liberty to give evidence and notice to the world, of intent to repudiate them in the end, nor do any act which would prevent those bonds from truly representing her credit, the same as any other of her bonds would do. And the company was entitled to have them

* Davis vs. Gray. ante

† Abstract ante, p. 7, folio 17, Record p 25, f 57

without delay as soon as it earned them,—without new conditions and exactions and without law-suit and strife. All that could be required of the company was the doing of those things which were stipulated in the contract. The rest was for the State to perform if she would hold her right to the forfeiture.

The party who would exact such a penalty, should come with very clean hands, and must not have been guilty of the *first breach* of the contract, nor have *hindered* the other party in its efforts to perform, nor have *rescinded* it, or *waived* the *condition.*

But in this case the State never did those things which were the consideration of the agreement of the company to do the thing for default of which, it was to suffer such forfeiture—that is, she did not lend her credit in manner and substance as stipulated in the amendment; and she did *first break* the contract, and ever afterwards refused to abide by and perform it as it was made, and as it was construed by the Supreme Court of the State. She *hindered* and delayed the company in the performance of it. She *rescinded* it; and she *waived* the penalty, and estopped herself from claiming under it even as against the company, and much more so against bona fide mortgagees, whose money lent to the company, was by it expended in effort to perform said condition.

The State broke the contract on the 5th day of Nov, 1858, by refusing to deliver her own bonds in exchange for bonds of the company secured by the said trust deed of July, 1858. *

She broke it again by exacting as further condition, that the company should make the supplemental deed of Nov. 27th, 1858. †

She broke it again by exacting as further condition that the company should execute and deliver a stipulation in writing that only one half of the State bonds to be issued under said amendment, should be drawn by the company on account of grading, constructing and completing its road ready for placing the superstructure thereon.‡

She broke it again by refusing to those who should become holders of her bonds issued to this company, equal rights under her banking laws with the holders of her bonds issued to other companies.‖

She broke it again on the 28th day of Sept., 1859, by refusing to issue and deliver to the company, State bonds to the further amount of $25,000. §

She hindered and delayed the company by all the above acts, and;—

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* Abstract ante, p. 15, folio 37. Record p 56 f 98
† Ibid ante, p. 16, folio 40. —— " " 59 " 105 - p 61 f 109 &c
‡ Abstract ante, p. 16, folio 40. —— " " 64 " 113
‖ Ibid, p. 18, folios 46-7. —— " " 64-5 " 114 - 15
§ Ibid, p. 19, folio 50. —— " " 67 " 119-20

By the foreclosure proceedings set forth in the bill,* for the company could not proceed with the construction of the road pending such proceedings, and:

She hindered the Company by the injury done to both the credit of the Company and the credit of the State by the joint resolution of Jan. 13, 1860, and the proceedings pursuant to it.† And by the act of March 6, 1860.‡ And by the concurrent resolution of March 10, 1860,‖ and by the adoption Nov. 6, 1860, of the constitutional amendments thereby proposed.§

The said provision amending Sec. 2, Article 9, "But no law levying a tax or making other provision for the payment of interest or principal of the bonds denominated Minnesota State Railroad bonds, shall take effect or be in force until such law shall have been submitted to a vote of the people of the State and adopted by a majority of the electors voting upon the same,"¶ following the other unfriendly acts above referred to, could not but be a most serious damage to the credit of the Company and to the credit of the State loaned to the Company. Its sure and quick effect, was, of course, the discredit of both parties. After that, the bonds of the State which had been delivered to the Company as a loan of the credit of the State, could not have their rightful value, or be such a substantial and beneficial "loan of the credit of the State for the purpose of expediting the construction of the road," as the said amendment and contract meant. This action was virtually and in its effect, repudiation by the State of her own bonds, and of the contract which contained said condition of *forfeiture.*

She also rescinded and repudiated the contract by the amendment of 1860 to Sec. 10, Article 9, which reads "the credit of the State shall never be given or loaned in aid of any individual, association or corporation, nor shall there be any further issue of bonds denominated Minnesota State Railroad bonds, under *what purports* to be an amendment to Section 10, Article 9, of the constitution, adopted April 15, 1858, which is hereby *expunged* from the constitution, saving and excepting, and reserving to the State nevertheless, all rights, remedies and forfeitures under said amendment." **

The reference to the amendment of 1858, as "what *purports* to be an amendment," &c., was another blackening of the reputation of her bonds issued under that amendment and an impairment of their credit and value.

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*Ibid, p. 21-23, folios 58-61.
†Abstract ante, p. 20, folio 53.
‡Ib., p. 21, folio 55.
‖Ib., p. 21, folios 56-7.
§Ib., folio 57.
¶Abstract ante, p. 21, folio 56.
**Ib., p. 21, folio 57.

Record 67-8 & 75-to 82
" 71-2
" 73
" 74 & 130 131.

It should be kept in mind here, that *when this was done; the company had completed sixty-two and one-half miles of its road, all except laying the rails upon the prepared road bed; and the time for the completion of fifty miles, according to the condition of the contract, had not nearly expired.*

The company had all the remaining part of 1860 and the whole of the year 1861 to lay fifty miles of iron on a roadbed already graded and prepared for it. Also that the company, if in default of interest on its bonds held by the State, might still pay up, and thereby be restored to the privileges of the amendment.* The forfeiture was not a penalty for non-payment of interest—other remedies were provided for that.

This rescision of the contract (the constitutional amendment) was necessarily total; that is, the State could not rescind or "expunge" for herself alone, and hold the company to performance of the obligation which rested for consideration upon the *precedent* performance of the undertaking of the State. "Where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put in *statu quo*."† And therefore the attempt, while expunging the contract and withholding the promised aid, to reserve a forfeiture not yet accrued and which could only accrue, by reason of the failure of the company to perform the contract after the State had performed it, and given such promised aid; is absurd.‡

The act of March 8, 1861, with its acceptance, by the company, was a mutual rescision, and agreed abandonment, of all prior contracts, engagements, and obligations; and a waiver and release of all previous defaults and forfeitures, if any there were; and a new contract in the premises.

That the contract of this act, took the place of the contract of the constitutional amendment, is plain, for this reason. If the *ten* miles from St. Paul to St. Anthony, specified in the act of 1861 had been completed by the 1st of Jan., 1862; it could not be claimed that the State could enforce the forfeiture of the constitutional amendment for not completing *fifty* miles in the same time. The two requirements can not stand together. The State gave up the completion in that time, of forty miles of road; the company gave up the benefit of the State aid.‖

At and before the passage of this act, it was a mooted question, much discussed, and upon which there was great diversity of opinion; whether under the provisions of the constitution, which was adopted

*Abstract ante, p. 7, f. 16. Record p. 26 f. 50

† Per. Ellenborough in Hunt vs. Silk, 5 East, 452.

‡ See Chittey on Contracts, 635, and cases there cited; 2d Parsons on Contracts, 678, and cases there cited.

‖Abstract ante, p. 25, f. 67-8. Record p. 85

after the act of incorporation; providing that "no corporations shall be formed under special acts, except for municipal purposes;" an unqualified forfeiture, such as the said constitutional amendment provided for, would not operate by way of merger to put an end to the *franchise of corporate entity* and so necessitate the creation of a new corporation under the general law for the construction of these roads. And if such should be the effect; whether the further provisions in the constitution that "each stockholder in any corporation (formed under the general law) shall be liable to the amount of stock held or owned by him," would not operate to discourage investments, and delay for a long time the construction of the roads, if indeed it would be possible to get them constructed by a corporation which being created subsequent to the adoption of the constitution, would be bound by said provision. This was another reason for the abandonment of the said forfeiture clause of the constitutional amendment and the *substitution of the new and different conditions of this act;* and the provisions that upon forfeiture under the substituted conditions "the State shall hold and be possessed of all such lands, property and *franchises* so forfeited, without merger or extinguishment, to be used, granted or disposed of for the purpose of aiding and facilitating the construction of said road and branch."

This is an important and suggestive provision, the effect of which will be considered in connection with the 9th assignment of errors.

SIXTH.

The court erred in holding that if there were forfeiture under the *constitutional amendment;* the trusts and lien of said trust deed, and the title of the trustees, and all rights and equities of the bond holding creditors, were subject to such forfeiture, so that they could not be enforced against the lands of the Congressional grant; nor against the franchises granted by the State; nor against the tolls and income of the railroad; nor against any other property described in the deed, and not even, against the property which the company bought and paid for with bonds issued under the deed.*

Because,—

Though in cases of forfeiture upon condition *in deed*, the grantor is seized of his first estate, and by his re-entry or its equivalent, avoids intermediate estates; and a like rule may prevail when the condition *in law* is for the purpose of securing payment of a tax.†

*Record, p. 131. And case of Winslow, Abstract p. 15, f. 38.

†(NOTE.) In the case of a tax, the holder of the lien can protect himself by payment. But in this case he could not perform the conditions, and ought not to suffer for the fault of another, which he could not help.

This is no such case; and in all other cases the forfeiture is subject to the liens; not the liens to the forfeiture.* And a *trustee* can not forfeit at all; and the reason is that the innocent *cestui que trust* shall not suffer for the wrong of his trustee.

And if we admit away everything else this holds good, namely—that *by force* and *operation of the 21st section of the act of incorporation*, any forfeiture which the State might enforce, could act only on the estate and rights of the *company;* that is, its *stockholders. The State, because she had authorized this deed and all its trusts, would herself be bound and estopped thereby. And any title which she could acquire would be subject to the trusts and lien of this deed.*

Even if there had been reverter to the United States, and afterwards a re-grant to the State for the same railroad; we think this trust would have at once attached to it in the hands of the State; because, she had consented to the conveyance in such trust of her expectant and future title.†

The railroad company received these franchises from the State; and also all her present title, legal and equitable, together with *her expectant and future title*, as a fund upon the credit of which it was to borrow money to carry on a public work—a fund with which to meet its engagements with third persons, which the State by the charter expressly authorized it to make for the purpose of constructing a work of great benefit to both the State and to the United States, and which was desired by both—all which franchises and rights of property, legal and equitable, present and prospective, the State by the said *21st section* of the charter, expressly authorized the company to convey and pledge in trust as was done in this deed, as security for money borrowed by the company for such purpose. Having thus granted this fund to the company and authorized it to convey, pledge and set apart the same, in trust or mortgage as aforesaid, and thereby invited and induced the public to give credit and lend money under such assurance that said fund—the franchises and rights of property were authorized to be pledged and mortgaged as security for the payment of money so loaned—whenever the company had so conveyed and pledged the same as such security, and parties had loaned their money on faith of it, *a contract between the State and such lenders not to withdraw or withhold that fund to their injury at once arose.*

That the charter, (Secs. 11, 16, 20 and 21,)‡ followed by the execu-

*4 Bl. Com. 381, 387; 4 Kent, 427; Statutes of Minn. above cited; Mumma vs. Potomac Co.; and Davis vs. Gray, above cited.

†Abstract ante, p. 3, 4, f. 5-9. (Secs. 11, 16, 20, 21)

‡Abstract ante, p. 3-4

tion of the trust deed amounted to an assurance held out to the public *by the State* that any one who should lend the Company money for the said purpose upon the security and trust fund of said deed, might rely on the same for payment, is not to be doubted. And when third persons acted on this assurance, and parted with their money on the faith of it; the transaction had all the elements of a binding contract; and the *State*, could not withdraw the fund, or any part of it, without impairing its obligation. This is the doctrine, and nearly the language of this Court, in *Curran vs. Arkansas.**

And the same doctrine is in Mr. Justice Story's opinion in the Dartmouth College case. He says:

"By the terms of the charter, the trustees, and their successors, in their corporate capacity, were to receive, hold, and exclusively manage all the funds so contributed. The crown, then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes, *without any interference on its own part*, and should be forever administered by the trustees of the corporation, unless its corporate franchises should be taken away by due process of law. From the very nature of the case, therefore, *there was an implied contract on the part of the crown with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing up, and founded on a valuable consideration, that the crown would not revoke or alter the charter, or change its administration without the consent of the corporation.*"

And this is believed to be in accordance with every utterance of this court in analagous cases.†

A charter is not only a contract between the State and those who may become corporators, but, is also a contract between the State and those who become creditors, relying for security on the provisions of the charter.

For the same reasons the State could not by any act or process, turn her equitable title to the lands into a legal one, or her expectant title, into a present one, without it at once enuring to the benefit of such creditors. She could never afterwards acquire or reclaim title to the franchises, rights and property, which she had thus authorized to be conveyed to trustees for creditors, *so as to hold them adverse to*

pay
not

*15 How., 314.

†Curran vs. Arkansas, 15 How., 304; Woodruff vs. Trapnal, 10 How. 190; Hawthorne vs. Calef, 2 Wall., 10; Van Hoffman vs. City of Quincy, 4 Wall, 535; Barings vs. Dabney, 19 Wall., 1.

*said trust, or disencumbered of the lien of said creditors.** There is no more certain and effectual way for a State to raise an estoppel upon herself. It is the same as if she had undertaken without the aid of a corporation, but through her own officers, to borrow money and construct the road, and had given as security for the money a similar trust deed of the same property. And if the provisions of the charter do not amount to a perfect grant of title to the company, they are good as a *power;* the same as if authority had been given to some officer, to make such trust deed. Indeed such a corporation is in many respects a public functionary, and exercises a sort of office.

The extreme caution, of the provision in said 21st section, that the *faith*, of the State is not pledged, *for the redemption of the bonds*,† shows that it was meant, that the franchises and property, and all the interest the State had in relation to them, was pledged.

But again, nothing could be forfeited by the Company after the making of the deed, except its own remaining interest; that is the equity of redemption or the interest of the stockholdors in the *surplus* of the fund, for nothing else belonged to the company, and even the trustees could not forfeit the rights of *cestuis que trust.*‡

The argument of the learned judge, based upon the provisions of the constitutional amendment, being older than the plaintiff's mortgage, (Record, p. 131,) defeats itself by proving too much. His reasoning seems to be this—the creditor lent his money, knowing that there was a reserved power in the government to deprive the borrower of both life and property, for cause; therefore the lender voluntarily, and with eyes open, and mind informed, took upon himself the risk of the occurrence of the cause; and the exaction of the forfeiture; that is, the risk of losing his security in such event.

But there is a like reserved power in the government to take the life and property of all corporations, and of all natural persons, for cause, and of all political corporations without cause. Now suppose, first, that a municipal corporation is authorized by the legislature to borrow money for a specified purpose, and to mortgage certain property as security for the loan, and does so; second, a private corporation; or such as is every railroad corporation; is authorized to borrow money to enable it to do that for which it was created, and to mortgage its franchises and property to secure the loan, and does so; third, a natural person is authorized to mortgage his property to secure a loan for lawful purpose, and does so,

* Davis vs. Gray, 16 Wall., 223, and case above.
†Abstract, page 4, folio 9.
‡Jacobs' Law Dict., forfeiture.

There are ancient provisions of law—the common law known to every one—that the municipal corporation may without cause be deprived of the rights and property so by it mortgaged—that the railroad corporation may for cause of non-user of its franchises, forfeit the rights and property so by it mortgaged; and the natural person may for cause of neglect of duty to the State, (crime), forfeit the property so by him mortgaged. And because said provisions for forfeiture are *older than the mortgages, and were known to the lenders when they lent their money*, therefore they underlie the rights of the creditors secured by the mortgages in such sense that *they* must suffer for the wrong of those to whom they lent their money for a good purpose. And carrying the argument out, we must come to the conclusion that there is in law, no such thing as security for a loan—that is ; nothing which will secure the lender against the subsequent wrong of the borrower; as in every possible case *he* may forfeit the mortgaged property, under provisions of law, which are older than the loan. This it seems to us is absurd. And with equal reason it might be argued, judicial process is not necessary in any case.

And then the above cited statutory provisions are older than the loan amendment, and therefore *they* underlie the rights of creditors. Do they not?

The true law, is this; that in all cases of forfeiture, other than for breach of condition in deed or legislative grant, and in revenue cases, the State takes such title and interest only as the *forfeitor* has at the time the cause of forfeiture occurs; and the title of the mortgagee is not forfeited by the act of the *mortgagor*. And the interest of a *cestui que trust* is never forfeited by any one who is trustee for him.* And applied to this case, even if the State took any thing by forfeiture under the constitutional amendment—which we do not think—still she took only the rights and title which remained in the company at the time the cause of the forfeiture occurred, which was January 1st, 1862—that is, the State got the company's equity of redemption, or right to the surplus under the trust deed of July 31st, 1858, and the control of administration of the corporation. And this only by judicial process and judgment†. There is no pretence of any judicial proceedings. So jealous is the common law in this matter, that though a man commit treason, which is cause of forfeiture of all his lands, yet if his condemnation and execution be by *court martial*, they shall not be forfeited.‡

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* 4 Bl. Com. 381,387; 4 Kent, 427 ; Jac. Law Dic,, Title forfeiture.
† Davis vs. Gray, 16 Wall., 223.
‡ Co. Litt., Sec. 4, 13, a.

The constitutional amendment did not override or abolish said section 21, or prevent the estoppel we have above claimed, because the very requirements of that amendment could not be performed without exercising the power conferred by that section; for the company was required to deliver to the State first mortgage bonds which it could issue only by virtue of the power therein conferred.

The gist of this amendment is a contract by the State to help the company borrow money under and by the power granted in *that section*. The State undertook to become a sort of partner with lenders, upon the security therein authorized to be given by the company. The design and sure effect, of this confidence and example of the State, was to induce others to rely on the same security. Instead of impairing the power given in the charter to borrow money, and secure the lender by such trust deed or mortgage, the amendment confirmed and enlarged it, and encouraged people to confide in it. The State by the charter had said to those who lend money on mortgage, if you will lend this company money to construct a public work of great interest to me, you shall have this security; and by this amendment she *added;* for the purpose of expediting the construction, and to show you my confidence in the company and in the security, I will take a large number of its bonds secured in the same way, in exchange for my own bonds. Was this impairing the power given by the 21st section or its effect when acted upon?

The Supreme Court of the State a few months after the adoption of this amendment, and knowing the history of its proposal and adoption, said of it: "The charter of the company making this application is framed, no doubt, with a view to just such a course to raise money as here indicated, (Sec. 21, of the charter,) and as this amendment *was framed with direct reference to the charters of the several companies intended to be benefitted*, it is not difficult," &c.*

For these reasons the State could not take or hold the property free of lien, "*leaving the creditor in a condition in which his rights live but in grace, and his remedies in entreaty only.*"

SEVENTH.

The Court erred in holding that the foreclosure proceedings set forth in the bill,† did not bar any title or claim by forfeiture under the constitutional amendment.‡

Because, if the said proceedings were valid, then there was nothing for the forfeiture to take effect on, for the State would already

* Minn. and Pacific R. R. Co. vs. Sibley, 2 Minn., 19.
† Abstract ante, pp. 21-22. Record p. 68 + 75 - to, 82
‡ Record, p. 132.

There are ancient provisions of law—the common law known to every one—that the municipal corporation may without cause be deprived of the rights and property so by it mortgaged—that the railroad corporation may for cause of non-user of its franchises, forfeit the rights and property so by it mortgaged; and the natural person may for cause of neglect of duty to the State, (crime), forfeit the property so by him mortgaged. And because said provisions for forfeiture are *older than the mortgages, and were known to the lenders when they lent their money*, therefore they underlie the rights of the creditors secured by the mortgages in such sense that *they* must suffer for the wrong of those to whom they lent their money for a good purpose. And carrying the argument out, we must come to the conclusion that there is in law, no such thing as security for a loan—that is ; nothing which will secure the lender against the subsequent wrong of the borrower; as in every possible case *he* may forfeit the mortgaged property, under provisions of law, which are older than the loan. This it seems to us is absurd. And with equal reason it might be argued, judicial process is not necessary in any case.

And then the above cited statutory provisions are older than the loan amendment, and therefore *they* underlie the rights of creditors. Do they not?

The true law, is this; that in all cases of forfeiture, other than for breach of condition in deed or legislative grant, and in revenue cases, the State takes such title and interest only as the *forfeitor* has at the time the cause of forfeiture occurs; and the title of the mortgagee is not forfeited by the act of the *mortgagor*. And the interest of a *cestui que trust* is never forfeited by any one who is trustee for him.* And applied to this case, even if the State took any thing by forfeiture under the constitutional amendment—which we do not think—still she took only the rights and title which remained in the company at the time the cause of the forfeiture occurred, which was January 1st, 1862—that is, the State got the company's equity of redemption, or right to the surplus under the trust deed of July 31st, 1858, and the control of administration of the corporation. And this only by judicial process and judgment†. There is no pretence of any judicial proceedings. So jealous is the common law in this matter, that though a man commit treason, which is cause of forfeiture of all his lands, yet if his condemnation and execution be by *court martial*, they shall not be forfeited.‡

* 4 Bl. Com. 381,387; 4 Kent, 427 ; Jac. Law Dic,, Title forfeiture.
† Davis vs. Gray, 16 Wall., 223.
‡ Co. Litt., Sec. 4, 13, a.

The constitutional amendment did not override or abolish said section 21, or prevent the estoppel we have above claimed, because the very requirements of that amendment could not be performed without exercising the power conferred by that section; for the company was required to deliver to the State first mortgage bonds which it could issue only by virtue of the power therein conferred.

The gist of this amendment is a contract by the State to help the company borrow money under and by the power granted in *that section.* The State undertook to become a sort of partner with lenders, upon the security therein authorized to be given by the company. The design and sure effect, of this confidence and example of the State, was to induce others to rely on the same security. Instead of impairing the power given in the charter to borrow money, and secure the lender by such trust deed or mortgage, the amendment confirmed and enlarged it, and encouraged people to confide in it. The State by the charter had said to those who lend money on mortgage, if you will lend this company money to construct a public work of great interest to me, you shall have this security; and by this amendment she *added;* for the purpose of expediting the construction, and to show you my confidence in the company and in the security, I will take a large number of its bonds secured in the same way, in exchange for my own bonds. Was this impairing the power given by the 21st section or its effect when acted upon?

The Supreme Court of the State a few months after the adoption of this amendment, and knowing the history of its proposal and adoption, said of it: "The charter of the company making this application is framed, no doubt, with a view to just such a course to raise money as here indicated, (Sec. 21, of the charter,) and as this amendment *was framed with direct reference to the charters of the several companies intended to be benefitted*, it is not difficult," &c.*

For these reasons the State could not take or hold the property free of lien, "*leaving the creditor in a condition in which his rights live but in grace, and his remedies in entreaty only.*"

SEVENTH.

The Court erred in holding that the foreclosure proceedings set forth in the bill,† did not bar any title or claim by forfeiture under the constitutional amendment.‡

Because, if the said proceedings were valid, then there was nothing for the forfeiture to take effect on, for the State would already

* Minn. and Pacific R. R. Co. vs. Sibley, 2 Minn., 19.
† Abstract ante, pp. 21-22. Record p 68 + 75-to, 82
‡ Record, p. 132.

have everything. And if the proceedings were not valid, then the State was estopped from complaining that the company had not performed the condition, because, the foreclosure proceedings would naturally, for the time, delay and prevent such performance.

The two remedies were inconsistent, and could not be used cumulatively; that is, if the State chose to try the foreclosure remedy *before the time for performing the condition expired;* she must stand on her foreclosure title. An attempt to get title by foreclosure nearly two years before the time for performing the condition had expired; precluded the State from getting it afterwards for breach of that condition; because, as before said, the company would be hindered and delayed, by reason of such proceedings.

EIGHTH.

The Court erred in holding that the act of March 10th, 1862, was intended as an enforcement or taking advantage of the condition and forfeiture of the *constitutional amendment.*

Because :

1st. For the reasons stated under the 5th assignment, the State wished and intended to take under the act of 1861, "without merger or extinguishment," &c.

2nd. This act can not stand as an equivalent for re-entry for breach of condition in deed; because the constitutional amendment was no deed.

3rd. It is not competent for a legislature, by its own act, to seize property for breach of condition in *Statute.*

But if this were a case in which an estate might be divested from the company, and vested in the State by legislative act—mere words of grant to another (as in this act) would not effect any thing—because until after the State, by some independent and separate act, divested the company,and acquired the title to herself; her mere words of grant would be inoperative. The view of the court below seems to be, that if a majority of the Legislature think a corporation has laid itself liable to a forfeiture of its franchises and property, all they have to do, to divest the corporation, is to pass an act granting them to some one else. But a grant before office found, is void,* and so is a grant before re-entry or its equivalent;† and the reason is that until then, there is nothing to grant ; and the forfeiture may be waived. To have accomplished what is claimed in this regard ; there should have been *two* acts; the first declaring the forfeiture, and the second disposing of the title which was acquired by the first. That is, there

*3 Bl. Com., 259.

†Nicoll vs. N. Y & E. Railroad, 2 Kernan, 121, &c. Even a mortgagee can not take advantage of a condition by conveying to another.

should have been *some intervening time*, however short, when the title was *in the State*. But here there was no such time, for the State did not own the property (on this ground of title) the moment before the act was passed, and she could not have owned it afterwards. The State did not undertake by this act to pass title *through* herself, but outside herself. But there is no way she could pass it to another without by a *previous* act taking it to herself.

It is true a legislative declaration may be equivalent to re-entry, but re-entry would not avoid a grant from strangers, or the lien of such creditors as Winslow, for example. Nor would it, as we have seen, avoid an estate from the grantor, except one conveyed by him, by the same deed which contained the condition.

And there is no re-entry to avoid *franchises*. To make provisions for *their* forfeiture effectual, "*they must be grasped and wielded by the proper judicial action.*"*

The only ground upon which this act of 1862 can be upheld, is that it was taking advantage of the forfeiture provided in the act of 1861, which took effect of itself, upon the happening of the event.†

And this forfeiture, it is conceded, would not affect the rights of bond-holders secured by the prior deed of 1858.

A change in the succession of corporators, does not change the corporation, in its existence or liabilities, no matter how such change is brought about; and because the St. Paul & Pacific Railroad Company, and its successors, have succeeded to and hold, *the franchise to be a corporation, created by the charter of May 22d*, 1857; they are in law the same abstract and metaphysical being; the same, invisible, incorporeal, immortal, *personal entity;* and so liable for its debts.‡

This will be further considered under the next assignment.

NINTH.

The court erred in holding that the Act of March 10, 1862, created a new corporation; and that the St. Paul and Pacific Company is not the same corporate entity, as the Minnesota & Pacific Company; and so liable for its debts.

Because:

The State by the Act of March, 1861, evidently intended, if she should take by forfeiture at all, to take under the provisions of that Act, that is, to "hold and be possessed of all such lands, property and franchises so forfeited, without *merger or extinguish-*

*Davis vs. Gray, 16 Wall. 223.

†Abstract, p. 25, f. 68. Record p. 85 f. 154

‡See 2 Kent Com. Lecture, 33; Bl. Com., chapt. 18; 2 ib., chapt. 3, p. 37; Story, I., in Dartmouth College case.

disproved

, granted or ~~disproved~~ of for the purpose of aiding
the construction of said road and branch.'"*
this when it happened, was to put the State in the
ith the rights and interests of the *stockholders*. It
the sole corporator in the corporation; the same;
me relation to mortgagees, as if that result were
other way; *ex. gr.* as by assignment of all the
each one transferring his certificate of stock. It
ansfer, or alienation of title to the things trans-
same result as to creditors, as if the alienation had
any other way.†

without merger or extinguishment" as here used
, and therefore with emphatic force to the franchise
ntity; for there was no danger of such thing
And as for those franchises which were not
ted the corporate entity, or personality; but
faculties or prerogatives,—the legislature was
from granting *them* to any individual, partner-
tion. They or their exact counterpart, together
nd could without the aid of this act "be granted,
for the purpose of aiding and facilitating the con-
id road and branch," *if*, any one could be found
dertake that task without being a corporation, or
one created before the provision of the constitution
nal liability on stockholders. & Equality of taxes
t design of this ~~proposition~~ was to keep the old—
rate entity in existence—with new parties in the
with the rights of stockholders. And it will be
his act makes no attempt on the estate of the trus-
d become vested prior to its passage. It is not
the State shall hold and dispose of the franchises
with merger and extinguishment of the mortgage
money borrowed and expended, to bring into exist-
rve the very property and franchises that were to
ed.

evidence or reason to suppose that the Legislature,
ended to abolish the sound maxim that, "*that should*
ion which has received the benefit."

all the franchises—and among others, the franchise

e, p. 25, f. 68. Record p 55 f 157

may be a corporator, and the only one in a corporation of her
ith liability, as other corporators, see Bank of U. S. vs. Plan-
Wheaton, 904. Bank of Ky. vs. Wister, 3 Pet., 318. Briscol
., 11 Pet., 323. Darington vs. Bank of Alabama, 13 How.,
ases above.

to be the corporate entity of the Minnesota and Pacific Railroad Company, under the charter of May, 1857; is by this act of 1862, *continued and granted to and vested in*, the said Woodbury and others.* How could this be done, and said grantees not be the corporators of said "*continued*" corporate entity?

And again; two things ought to be presumed by this Court; namely; first, that the legislature did not intend violation of the provision of the constitution which prohibited the formation of corporations of this character by special act;† second; that the legislature intended that the grantees of said act of 1862, and their successors, perpetually, should have and enjoy all the rights and franchises which were conferred on the stockholders of the Minnesota and Pacific Company, by the act of 1857;‡ and these premises necessitate the conclusion, that the grantees and their successors, of the act of 1862, stand in the shoes of the corporators of the act of 1857.

If this be not the logical--legal--conclusion from the premises, where, and how, do the stockholders, and their successors, of the Saint Paul and Pacific Railroad Company, get their corporate entity?

TENTH.

The court erred, in holding that it was intended by said act to avoid the lien of said prior trust deed, or the debts before that time due to the bond-holders thereunder, *for money loaned for and used in the construction of said road;* with the notice of the fact to all the world; and that the Legislature could give to the act such effect.

Because—First—As to the intention. All the provisions of the act must be taken together; and the *9th and 12th sections*‖ are irreconcilable with the theory of such intent. On the contrary, these sections show that the authors of this Act thought that the debts of the Minnesota and Pacific Railroad Company survived as debts against Saint Paul and Pacific Company; and that they did not intend any other result. But for reasons of public policy, and because of the interest the State had in the speedy completion of the roads, the Legislature sought to provide that those old debts *which were not already secured*, should not be secured or their collection enforced in such *manner*, or at such *time*, as might seriously embarrass the Company, and disable it from immediately completing these public works.

And we claim that the persons who took all this property under this act; *without value or any consideration;* took it with more

*Abstract, p. 27, f. 74. Record p 88 & 157-8
†Constitution of Minn., Art. 10, Sec. 2. Record p 94 f 166
‡Abstract, p. 27, f. 74-5. Record p 88-9 f 157-8
‖Abstract, p. 28, " " 92 " 163-164

than constructive notice of the liens, and liability for the debts of the Minnesota and Pacific Railroad Company, *incurred to pay for that which came* into their possession without their paying anything for it.—That is, these sections of the act were notice.

Let these sections be closely examined and carefully analyzed. What is prohibited? What is not prohibited? The things forbidden make clear the things allowed. The declaration that certain things shall not be lawful, implies that they would be lawful without such declaration; and that they are lawful with the qualifications expressed in the prohibitory declarations.

The St. Paul and Pacific Company is prohibited from issuing capital stock, for any debt, liability or obligation of the Minnesota and Pacific Company, except for the bona fide purpose of constructing, completing and equipping said road or branch, *until*, a certain specified part is completed; *after that time, stock may be issued for that purpose.*

2d. It shall not make any new mortgage or lien for such purpose *until such time*, nor after that time upon the *un*completed parts of the road. *After* so much has been *completed, then* such *completed* portions may be mortgaged and encumbered for the purpose of securing and paying the debts of the Minnesota and Pacific Railroad Company. And as to the liens already acquired and vested, *they* are not declared to be unlawful or divested.

The appropriation for such purpose of the corporate funds acquired by the earnings of the completed portions of road—when completed —or funds derived from other source; as for example, *cash sales of lands;* is not prohibited. All along, the line is drawn, just at those points, where the things prohibited, might, if allowed *at the start*, cause the failure of the Company; or at least delay it, in the prosecution of its work.

No execution issued or to be issued upon any judgment then rendered, *or thereafter to be rendered, against the Minnesota and Pacific Railroad Company*, on any liability incurred prior to January 1, 1862, could be *levied* upon any of the lands, property, or franchises, by this act granted to the St. Paul and Pacific Railroad Company, *unless* specially directed to make such levy by a decree or judgment of the court.

But the execution *might issue.* The *levy* only was prohibited. The Company *might be garnisheed;* or the Court *might "specially direct" that it be levied on the property by this act granted to the St. Paul and Pacific Company*, or any part of it. An opportunity was given to the Company to be heard against an oppressive execution of the precept of the writ—one that might stop the

prosecution of the work. The Court, upon such hearing, might order it first levied upon the lands, or other property *not required for the construction or the use of the road*, and upon the sale of which, if it were land, there would be *three years' right of redemption.*

The motive and aim of those sections, were similar to those which induce the passage of all stay laws. This is most manifest in the provision of the 12th section, in regard to injunctions. It is provided none shall issue except at general term of the Court, and upon sixty days previous notice. There were but two terms a year in any county, and in some counties through which the road passed, but one, and in others none, and during the delay of such mode of application, the Company could build across the man's land, and leave him to his remedy for damages, and in that way the Company be relieved from the alternative of yielding to extortionate demands, or stopping the work until the injunction suit could be disposed of.

The 12th section does not prohibit, but on the contrary plainly contemplates the *rendition* of judgments after its passage, on account of liabilities of the Minnesota and Pacific Railroad Company, incurred prior to January 1st, 1862—the date of the said forfeiture to the State without merger or "extinguishment." The provision is not well expressed, but it can not be said that those who used it, or those who took under it, were then of the opinion that the right of action upon such liabilities was abolished, nor that the Legislature intended it should be abolished.

There was no need of the above provisions unless the Legislature thought that without them the Company could lawfully do the things which they prohibited. And it was absurd to prohibit them only partly, by restrictions and limitations, if it could not do them under and subject to such restrictions and limitations. It certainly could not lawfully do them, if the said debts and liabilities of the Minnesota and Pacific Company were not in law *its own.* If the object was to settle a disputed point of law, and to declare the law to be that the new organization was not liable at all for the debts of the old, that would have been said in a few plain words, and not qualified and limited as to *form* and *time*, as is done in said sections

The Legislature did not prohibit the Company from making such security and payments of the debts and liabilities of the *other original corporations*, for instance, *the Transit Railroad Company.* Why not? It was because the St. Paul and Pacific Company was not a succession and continuation of such corporate entity, but a total stranger to it; and being such a stranger, such things needed no prohibition or restriction, being clearly unlawful, on general principles. Yet the theory of the respondents is, that they are equally

strangers to the Minnesota and Pacific Company. This can not be maintained in the face of the above cited sections.*

The sum of the argument is—

BECAUSE THE STATE AUTHORIZED THIS TRUST, SHE WAS BOUND BY IT, AND TOOK THE PROPERTY CHARGED WITH IT.

ELEVENTH.

The court erred in holding, that for any cause presented by the record, the said trust deed of July, 1858, is not a valid and subsisting charge and lien, and the first lien upon the property, rights and franchises therein described, to secure the payment of the bonds issued thereunder.

Under this assignment, we propose to discuss the effects of the foreclosure proceedings, which occupy much space in the record, and were discussed in the court below, but which the learned judge, having concluded to dismiss the bill upon other grounds, passed "until their determination becomes absolutely necessary."†

1. In the first place, we think this court ought not at this late day go behind the decree of the Minnesota court, which adjudged both the sale and the instrument which was the pretended authority for it, void and of no effect.‡ That court had *original* jurisdiction as broad as the High Court of Chancery of England. We think it clear that the court had jurisdiction of the Governor sufficient for the purpose of the decree.‖ But suppose it had not. It undoubtedly had jurisdiction of the *trustees;* and the State in this matter was simply one of their *cestuis que trust*, and as such she was in court by them. It was held by the Supreme Court of the State, in the very suit in which this decree was rendered, that "the *cestui que trusts* need not be joined as parties. The defence of the trustees is their defence, and their presence in court is not necessary."§

The State had no rights in this matter, whether under the original trust deed or the supplement, except as a bond-holder; and the trus-

*NOTE—In regard to the circumstances of the forfeiture under act of 1861, and the passage of this act of 1862, see allegations in the bill (Abstract, pages 26-7. Record p 87. 6

† Record, 231-2.

‡ Abstract, p. 24, folio 65 Record p 84

‖ See Osborn vs. U. S. Bank, 9 Wheaton, 738, and other cases in this Court.

§ 4th Minn. Rep., 317.

tees were *her* trustees and representatives under both deeds. In the start, the Supreme Court of the State had decided that the constitution had placed the State "*on an equal footing only with other creditors, as to the bonds received from the companies.*"* Did not this place her on an equal footing only, with other creditors in said suit, as to the jurisdiction of the court?

The only necessity there was for making the Governor a party on the record, was in reference to the prayer for the preliminary injunction. For the other purpose of the suit—adjudging the supplemental deed to be void—he was not a necessary party, any more than any other *agent of one bond-holder*, which was all the Governor was in this matter.

All through the supplemental deed and the proceedings under it; the Governor is discribed, and his authority qualified as *the agent* of the State.† And he finally acted as the *attorney in fact of the company.*‡

The State, in entering into this contract of lending, laid aside her *political dignity*, to the extent of giving the courts the same jurisdiction as to her interest in the common trust fund which they had as to the interest of the other bond-holders in it. The State was nothing but one of the bond-holders. And the Governor was not as to this matter clothed with the political dignity of Executive of the State, for he derived his authority solely from a *contract* with the company, because, although it is part of the constitutional amendment, that amendment does not stand on the sovereignty of the State. It had no force until assented to by the company. The *political* power of the State was not competent to confer this authority on the Governor. The authority conferred does not pertain to the office of Chief Magistrate, and might as well have been conferred upon any other officer, or even a private citizen. Therefore, the Governor's status in the premises was simply that of an *ordinary business agent.*

But it was well that even as to the main purpose of the suit—setting aside the supplemental deed; the Governor was made a party, and the papers served upon the Attorney General. For it gave the State an opportunity to make any separate defence she thought she had, independent of the trustees; so it can not now be said that her representation in the case by the trustees was only in a technical sense; and that she has not in fact, and for all beneficial purposes, had her day in court.

2. In the second place, we think that if any title were acquired

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* 2 Minn., 21.
†Abstract, pp. 16, 17, 22; folios 42, 43, 44, and 59. Record p. 62–76
‡Ib,. p. 23, folio 61. Record p. 82, f 144

under the Governor's sale, an end was put to it, and the company restored to its former status, by the act of March 8, 1861.* .

In our opinion, the true character and status of the respondents, is to be discovered in and traced from this act. To rightly understand it, we must recur to the situation at the time of its passage. The decree, setting aside both the sale and the supplement, which was its foundation, had been made. It would, therefore, be impossible for the *State* to get any capitalists to proceed with the construction of the road in face of this decree until reversed. And an appeal with a view to reversal, even if successful, would waste years of time. On the other hand, though the decree was in support of the rights and continued existence of the company, yet *it* could not go ahead with the work if the decree were questioned by appeal. It was a good case for compromise, and this act was a compromise. The State by it waived her right to continue or procure through the defendants Sanborn and Lund, a continuance of a litigation that was injurious to her interests, and *quieted the title of the company* by this release. She not only gave back what she got, if she got any thing by the foreclosure, but she also gave up her own claim to the security of both the trust deed and the supplement, and also the bonds of the company which she held as collateral. All was released and restored upon certain conditions, which being accepted, made a new contract with the company, in substitution of the contract made by acceptance of the constitutional amendment. And this new contract provided the much-needed thing, namely, a forfeiture "without any further act or ceremony whatever," and "without merger or extinguishment."†

It could not have been the intention, that in case of forfeiture under this act, that the State should stand only in the same position, and take the same title, she claimed prior to the passage of the act, because that title had been already declared null, by a court whose decree was final unless appealed from within six months, and under this act said forfeiture could not occur until long after such time for appeal—and so, upon such a construction, the State could take nothing by the forfeiture.

The intent was to give up unconditionally the foreclosure title, and provide for a title (if the occasion should arise,) by forfeiture under this act.

3. In the third place, the repeal or "expungement" of the constitutional amendment, had the effect to restore all the State acquired; if anything under its provisions—because, a party who will rescind a

*Abstract, p. 25, folio 66. Record p 83

† See remarks under 9th assignment.

contract must restore all acquired under it and put the parties in the same state they were before.*

4. In the fourth place; if the supplement and foreclosure were valid, as between the State and the company; the lien of other bond-holders was unaffected thereby, that is, all that the State did or could acquire was the rights and interests of the mortgagor, the company; because the State did not pay anything, but took or attempted to take the whole trust fund for the interest due upon her own bonds without payment or provision for payment, or *pro rata* payment of the interest due to other bond-holders; and, "IT WOULD BE AGAINST THE PRINCIPLES OF EQUITY TO ALLOW A SINGLE CREDITOR TO DESTROY A FUND TO WHICH OTHER CREDITORS HAD A RIGHT TO LOOK FOR PAYMENT."†

If, however, the court is of the opinion, that the above reasons do not dispose of this branch of the case, then we submit, for its consideration, the following reasons for the decision of the State Court, holding said supplemental deed and foreclosure void.

I.

The proceedings of foreclosure sale, set forth in the bill were illegal, null and void, because:

First. Under the charter of the Company and the constitutional amendment, it was *legally impossible* to make a valid sale and title in such manner.

The alleged sale was by the Executive of the State, made summarily, without any sanction or action of the judicial department, and without the co-operation or consent of the trustees, who were the common representatives of the bondholders, (including the State), all who, according to the Supreme Court, had *equal rights with the State in this security.*

2 *Minn.*, 21.

The executive had no right or authority, and the State no interest in the matter, except under, and as particularly defined and limited in and by the constitutional amendment of April 15, 1858; and the Company had no right to make a power of sale of its corporate property and franchises, except as contained, defined and limited in the 21st section of its charter. The authority of the Company to give a power of sale, or summary foreclosure, is expressed in these words, "and said Company is also hereby empowered and authorized in and by such mortgage or deed of trust, to confer upon *the trustee or mortgagee*, full and am-

* Hunt vs. Silk, 5 East, 448; and cases cited above.
† Ch. J. Taney in Gue vs. Tide Water Canal Co., 24 How., 263.

Per, Mr Justice Strong "When two or more persons have a common interest in a security Equity will not allow one to appropriate it exclusively to himself or to impair its worth to the others"

Jackson vs Ludeling 21 Wall. 616-622

ple powers to enter into and upon, and to take possession of, have, use and employ, or to *sell or dispose of* the whole or any part of said railroad and branches, and all corporate and other franchises, rights and privileges of the said company, and in case of any such sale, to grant and convey to the party or parties acquiring title under such sale," &c.*

Authority to confer upon the *trustee or mortgagee* such power of summary foreclosure, is not authority to confer it upon some favored *one* of the co-equal bondholders. The State had no rights in this matter, except as a bondholder, "*on an equal footing only with other creditors,*" 2 *Minn.*, 21; and the Governor was only the agent of *one* bondholder. The persons upon whom the Company might confer such summary or arbitrary power of sale were those expressly named in its charter, and "*expressio unius est exclusio alterius.*"

We suppose that if the State had not become one of the bondholders, it would be conceded by all, that the above provision of the charter did not authorize the company to confer such power of sale upon a favored bondholder, or upon any one of the trustees; and yet so far as this is a question of the construction of the charter, it must be decided as if the State had never had anything to do with the matter, for when the charter was passed it was not supposed she ever would have.

Was the charter in effect amended in this particular by the constitutional amendment, and the Company thereby authorized to confer such power upon the Governor?

It is not "given in plain words or by necessary implication," and we do not see how it can be made out even by forced construction or possible implication.

This amendment descends to particulars and prescribes minute details. It does not authorize the Company to issue bonds or make a mortgage or trust deed, but assumes that it has authority. The language used would fit a case where first mortgage bonds had already been put in circulation by the Company to a large amount. It says, "and as further security an amount of first mortgage bonds." There is nothing whatever to indicate an intention to make an alteration in the charter or enlarge the power of the Company. On the contrary, it is worded as it would have been had the trust deed and bonds been already executed, as they might have been.

The authority of the Governor is granted, defined and limited

*Abstract, p. 4, f. 9. Record p. 14 f 25-

in the following words, and the validity of his subsequent acts depends upon finding authority for them in this:

"The Governor shall demand and receive from each of said companies, before any of said bonds (the State bonds) are issued, an instrument pledging the net profits of its road for the payment of said interest, and a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which such company is or may be authorized to sell, in trust for the better security of the Treasury of the State from loss on said bonds, *which said deed or trust shall authorize the Governor and Secretary of State to make conveyances* of title to all or any of such lands to purchasers agreeing with the respective railroad companies therefor:

Provided, That before releasing the interest of the State to such lands, such sale shall be applied to the payment of interest accruing upon the bonds in case of default of payment of the same, and as a sinking fund to meet any future default in the payment of interest and the principal thereof when due; and as *further security an amount of first mortgage bonds* on the roads, lands and franchises of the respective companies, corresponding to the State bonds issued, shall be transferred to the Treasurer of the State, at the time of the issue of State bonds; and in case either of said companies shall make default in payment of either interest or principal of the bonds issued to said companies by the Governor, no more State bonds shall thereafter be issued to said company, and the Governor shall proceed in such manner as may be prescribed by law, *to sell* the bonds of the defaulting company or companies, or the lands held in trust as above, or *may require a foreclosure of the mortgage* executed to secure the same."*

Here, after stating explicitly what he might sell without the action of the *Courts* or the co-operation of any one, it says, "or he *may require* a foreclosure," &c. Now it is not said one *may require* a thing to be done, when it is meant he may *do it* himself. And the immediately previous express specification of sales that he might himself make—not require to be made—by a well known principle of construction, excludes the idea that he might make such foreclosure by his own act, and thus dispose of the common trust estate, without provision for others having equal rights in it.

It was the common right of all the bondholders, in case of default, to "*require* a foreclosure," either by the trustees—their common representatives, or by appropriate suit in Court; but such a foreclosure would have to be for the benefit of all other bondholders, as well as himself.

The State could not, like its co-bondholders, act in person—it must act by its agent; and the effect of the above quoted words was simply to designate and authorize the Governor as such agent, to make on behalf of the State, as one of the

*Abstract, p. 7, f. 15.

bondholders, just that requirement which any other bondholder could make for himself; that is, require the trustees to foreclose—not for the exclusive benefit of the State, but for the benefit of *all*; and upon their failure to do so, commence a suit for the benefit of *all*. In the language of the Supreme Court—2 *Minn.*, 21—the State was "placed on *an equal footing only*" with other creditors as to these bonds; and it cannot be maintained that any other bondholder could have lawfully assumed; or procured from the company authority to do for himself exclusively what the Governor did. For "*it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors have a right to look for payment.*"*

In the position that the constitutional amendment did not change the charter of the Company, especially said 21st section, but rather affirmed it, we are sustained by the decision of the Supreme Court—made the same year it was adopted, and *upon the faith of which decision the bondholders lent the Company their money.*

Referring to and citing this section of the charter, the Court says: "The charter of the Company making this application is framed, no doubt, with a view to just such a course to raise money as here indicated, (see sec. 21 of the charter,) and as this amendment of the Constitution *was framed with direct reference to the charters of the several Companies* intended to be benefitted," &c., that is to say, the amendment was framed to agree with, not change the charter.

This constitutional amendment, when it was accepted by the Company in the manner provided, became a CONTRACT. It was a solemn obligation. The State herself was one of the contracting parties. She proposed it. She chose the the words in which its promises and requirements, and remedies were expressed. She entered into it with the view of procuring relief to her people by inducing the companies to proceed, with great expenditure, when the times did not justify it, so far as their own interests were concerned.

Upon the fact and law, that this constitutional amendment was a CONTRACT, entered into with more than usual formality and solemnity, we lay great stress, and crave the attention of the Court.

Being a contract, it follows: That the State could not pass any law impairing its obligation.

Its terms could not be varied by either the Executive, Legislature or the Judiciary of the State.

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*Gue vs. Tide Water Canal Co., 24 How., 263.

Jackson vs Lindsley 21 Wall 616—34

Its requirements and powers could not be added to, any more than they could be taken from.

Neither the Governor or the Legislature, could impose conditions and terms not specified in the Constitution and *contract*, any more than they could dispense with those that were specified in it.

It was the law; the whole law; and the end of the law; upon all the matters upon which it spoke, and said what the Governor might *require* others to do, and what he might do himself. Beyond what it authorized he could not exercise authority.

Even if the Company, together with all of its creditors, joined with the Legislature and Governor in an agreement, enlarging the power of the State, or the Governor; yet such agreement would be a nullity unless submitted to and adopted by the people as an amendment to the amendment of the Constitution. There was no other way to change a contract entered into by constitutional provision.

And if the State, with no status but that of a bondholder upon an equal footing with others, had by a further amendment of the Constitution, added anything to her rights and powers as such bondholder—giving to herself any preference or special privilege, or mode of relief—such amendment would be a nullity, without the assent of the Company obtained, free from circumstances constituting *duress*. And even with such free assent, it would be void as to other bondholders, or creditors having an interest in the continuance of its existence and liability for its debts.

The contract made by the amendment of April 15, 1858, was inviolable, and could not be changed to the prejudice of any one having rights as creditors of the Company.

Looking to this as the Governor's *only grant of power*—his proceedings of sale are unauthorized and void.

These are questions arising under the Constitution of the United States (Sec. 10, Art. 1), and the federal courts are independent, and the superior judges of them.

Second. The act of August 12, 1858, can have no operation as to the original trust deed—the one executed and delivered July 31, 1858—nor as to the bonds secured by it.

If that deed was, as the Supreme Court in 2 *Minn.*, 13, held, a full compliance by the Company with the constitution, then the legislature could ask no more; it could not add to, or change the conditions. *It*, as well as the company, was bound by its terms.

Even if this act had been adopted by the people, as a further amendment and part of the constitution, yet it would not affect anything as to this company, because it had executed and *delivered* its said deed and thereby closed the contract, *twelve days previous to the passage of this act.**

But it cannot be made to appear upon a consideration of the whole act, that it contemplated, or intended to authorize the Governor to make a foreclosure by his own summary act.

This act is, to a large extent, a mere legislative enactment of the constitution, and to that extent it is simply useless. It does not authorize or require the supplemental deed; and although it required the companies to make the interest on their bonds payable sixty days previous to that on the State bonds; yet, it having been passed after the company had executed and delivered its trust deed, fixing the time of payment on its bonds, the only way this provision of the act could be met, was by the Governor fixing the time in the State bonds. He made that sixty days *before* instead of after.

Third. The supplement to the said trust deed exacted of the company Nov. 27, (after the Supreme Court had decided that bonds secured by the said original deed was all that the State was entitled to,) was ineffectual to enlarge the authority conferred upon the Governor by the constitutional amendment. His official rights and power over the trust in which others besides the State were interested, or might become interested, being defined and limited by the supreme law, he could not procure an enlargement of them by such an instrument.

If he could by agreement with the Company *add to*, he might by like agreement *subtract from*, the authority which the Constitution had reposed in him.

No officer can enlarge his authority *as an officer*, or procure the right to exercise it in a *more summary* manner than that prescribed by law, by entering into a contract with those who are the subjects of such authority, and over whom he may hold his official power *in terrorum*.

United States vs. Tingey, 5 *Peters*, 115.

Can a Sheriff, Marshal, or Tax Collector, make a valid agreement with one whose property is subject to his official power; giving him the right to proceed against such property or sell it in a more summary manner than the law has prescribed?

The height of the gubernatorial station does not take that officer out of this rule, but on the contrary makes its application

* Abstract, p. 14, fol. 35. Re cvid p 30,-1 f 55; & p 48 f 85

more strong against him; because that very height of power gives to *his* unauthorized demands more of the character of *duress*.

When one party in negotiation has the physical or moral power to ruin the other, and such power is over the latter *in terrorum*, though only by *hints* or inuendo—the contract so procured is void—if not on the strict grounds of duress, on the ground of *constructive fraud;* being an undue influence by the strong over the weak.

1 *Munf.*, 558; 2 *Litt.*, 118.

To have refused what the Governor asked might, at that time, through his displeasure, have been the financial ruin of the Company.

Even the Legislature cannot prescribe a more summary proceeding than the one (if there be one) prescribed by the Constitution. If it could it might prescribe a *less* one; and abolish the distinction between Articles of Constitution and Acts of Legislature.

This supplement went to the destruction of the equality of footing of the State with other bondholders, declared in 2 *Minn.* If the Supreme Court were right in that decision, the Governor violated the law and broke the contract in requiring it. *Can it be held that any other, or all of the other co-equal bondholders, could each for himself have procured by a like supplement, a like advantage and power of summary sale and confiscation of the common trust estate?*

The bonds secured by the trust deed of July 31st, including those in suit, refer to that deed, and as to the security provided by it, and proceedings which may be had under it, they make with it but one contract; and no matter when any particular one of said bonds may have been executed and delivered, such bond then relates back to the execution and delivery of the trust deed as part of the same contract.*

By accepting bonds issued after the execution of the supplemental deed referring to the original deed *alone* as security—the State waived all right of security under the supplement. To avail herself of such security she should have required that all bonds issued should refer to that as well as to the original. The governor's exaction fell short of its aim, through this oversight or intentional retreat.

In the Winslow suit it was argued, that, though the sale and supplement were void as to the plaintiff who got his bonds before the supplement was made; that it was binding as to those who got their bonds afterwards. This was answered by the court as follows:

*Abstract, p. 9, f. 21. Record p 34 f 61

"If the supplement is not binding upon the plaintiff, and it is not seriously contended that it is, it cannot, in the nature of the case, be binding upon anybody. This is evident from the character of the trust it seeks to affect. The bonds intended to be secured by the original trust deed, were all of one class, similar in form, equal in lien, and limited in the gross amount which could be issued. Their value was necessarily derived from the property and franchises contained in the deed; and which, upon default, were to be sold, not for the benefit of any particular bondholder, but for the benefit of all."

"By the terms of said deed of trust certain persons were designated as trustees, and to whom was confided the management of the trust, subject however, if necessary, to the control and direction of the Courts. After this deed had been executed, and had given character and value to the bonds; and after the plaintiff had acquired title to some of them, with knowledge of the terms and import of said deed, the Company to meet a special exigency execute a supplement containing provisions designed to favor a particular bondholder by giving to such bondholder exclusive control and management, in certain respects, of the execution of said trust. This supplement was not intended to be, nor was it a distinct independent instrument, containing covenants, and securing rights irrespective of the original deed; but it was intended to affect the terms of such original deed and qualify them in important particulars. It was not intended to be an instrument which could be separately foreclosed like a second mortgage, but to be incorporated and be construed with the original deed, so that all the bonds should be regulated by the two instruments, and equally affected by the terms of both. Now this supplement, if valid for any purpose, and with reference to any of the bondholders, is valid for all purposes as to all bondholders. *The bonds provided for in the trust deed are alike in legal contemplation*, and though one bondholder may take such a course as would estop him from questioning the validity of the supplemental deed, yet must abide the result of the same foreclosure, if it is to be held valid, and share equally in the avails of the mortgaged property. *The lien of the bonds is identical- is one lien--and cannot be diverted or changed, or affected by any instrument or proceeding that does not operate upon all equally and be equally binding upon all.*

"The trust is *indivisible*, and cannot legally be carried out and fulfilled but once. From its very nature there can be but one execution of it; one foreclosure and sale of all the trust property. Under it such foreclosure and sale of the mortgaged property, if valid, enures to the benefit of all the bondholders and disposes absolutely and beyond recall of everything secured by the trust, and effectually extinguishes the very existence of the corporation itself.

"It is, therefore, to my mind, a legal impossibility that there can be two valid sales of the property embraced in the trust deed and supplement. One such sale must pass the title absolutely to the purchaser, discharged of all liens and incumbrances in respect to the bonds, and the bondholders must thereafter look to the fund * and not to the original security for the payment of their

*As the Legislature did not make any appropriation of money to enable the Governor to pay his bid under the act of 1860 (Abstract, p. 21, f. 56; ib., p. 23, f. 61), and as nothing ever was paid, there was, in this case, no such fund to look to.

claims. *The original trust cannot be so changed, unless by consent of all parties in interest, as to divide or separate the lien of the bonds upon the mortgaged property.* It is not like the case referred to in argument of the giving of a mortgage, which for some reason may be a second mortgage as to one incumbrance, and a first mortgage as to the rest, and which may be foreclosed prior to the foreclosure of the first lien, and the property sold subject to such first lien; because the debt secured by such second mortgage is distinct from the other and of a different class or character. A second mortgage creates a new and independent lien, but does not attempt to change a lien already existing, or impose upon *one evidence of indebtedness a different character of lien from that stamped upon all by the original instrument.*

"I do not question the power of the company to issue as many bonds as may be necessary, up to the limit named in the trust deed; but they must *all be controlled by the terms and conditions of the trust deed, and equally entitled to the benefit of the security.* The company can give *no preference to the new issue, nor take away from the trustees originally named, the right and duty to carry out their trust according to their original contract.* The fact that the plaintiff is the owner of but five bonds, can make no difference in the application of these principles.

"It is not the value of the interests involved that controls, but quite other and different considerations. The five bonds of the plaintiff are as much entitled to the protection of the Court, as the 600 bonds held by the State of Minnesota. Nor is it necessary that all the bondholders should be represented in this suit.* It is not a case in which an account is sought, or the final disposition of some fund asked for, in which various parties are interested; nor is it an action whereby the plaintiff seeks to obtain anything from other bondholders; but it seeks simply to restore to their original condition, and place all the bondholders on an equal footing." * * *

II.

If the charter of the company, or the constitutional amendment, or anything else, had conferred upon the Governor, or empowered the company to confer upon him, a power of sale of the whole trust property; still the sale alleged in the answer was irregular, illegal and void, for the following reasons:

In the first place, it was a condition precedent to a sale by the Governor; that a *legal and proper demand* should be made upon the trustees to do it, followed by their refusal. †

There was not such a demand, and refusal. ‡

Now the trustees had no official relation to the said *State bonds.* Their power to sell was restricted to the case of the default of the Company to pay the interest on *its own bonds—those referred to and secured by the trust deed.* It is not true that the Company made default in the payment of interest on the bonds of

*See same case, 4 Minn., 313.
†Abstract, p. 17, f. 43. Record fo 62
‡Ib., pp. 19, 20, f. 51–4. " " 68–71 & fo 77 & 135–

the Company;* and she could not, until it became due, which was not until February, 1860. The Governor's demand was not well-founded in law, and in any view, it was premature, and it never was renewed. Moreover, the trustees were not notified that the State had become a holder of any of the bonds to which their trust related. They were asked to foreclose, without its being made to appear that the person asking, had, or represented any right or interest in the matter.

Certainly the law in such cases requires something more than a mere naked demand, unaccompanied by evidence of right.

Secondly. No offer or provision was made by the State or Governor, to pay the expenses of a foreclosure by the trustees; and surely the law did not require them to advance the money out of their own pockets, without security or provision of law for reimbursement.

Thirdly. The default of the Company should have been such an one as to cast a liability or obligation upon the State, to pay the interest. She had no right to demand a foreclosure, except to indemnify herself against loss on account of her own bonds. She did not hold the bonds of the Company as a debt, but as a collateral. As we have seen, the delivery of the State bonds to the Companies, did not in itself create any liability or obligation. The Company might retain the bonds or the interest coupons, and so long as she did this, there was no claim on account of them against the State. The *Company* could not use them as such claim.

It was necessary that they should be endorsed and transferred by the Company, before there was any liability or debt of the State. Until then, her obligation to pay did not begin to run.† The Company had her choice of two modes of protecting the State, or, in the language of the amendment, "exonerating her treasury" from advances of money on account of her bonds, namely; either to pay the interest as it became due, or retain the bonds or coupons in her own possession.

It is alleged in the bill that the State was not called upon to pay the interest;‡ and the fact that she was not, raises a fair presumption that the interest coupons had not passed out of the possession of the Company, and as a consequence, there was as yet no liability of the State to be indemnified against, and no right to demand a foreclosure.

The Governor ought to have waited until the State was called

*Abstract, p. ~~18, f. 48~~; ib., p. 20, f. 53. Re end p 67 & p 72 f 127
†Abstract, p. 6, folio 14. " " 27 & 48
‡Abstract, p. 23, f. 61. " " 82 f 144

upon to pay this interest; or at least until it appeared that some one had the right to call upon her. And he should also have notified the trustees that the State was a holder of some of the bonds secured by the trust reposed in them.

Fourthly. In advance of any demand on the State for payment of said interest, and without its appearing that she had become liable for it, or that the company had not exonerated her treasury from advances, by retaining as she might the coupons, the State made haste to repudiate her obligation to pay it —amended the constitution to prohibit future legislatures from paying it—and "expunged" the constitutional amendment, which was a *contract* with the Company, and which was the only consideration for any claim of the State to interfere with the trust property, or the trustees.

We say she could not, while committing such acts, proceed to sacrifice the Company and its property, pledged as security to others—in the manner and by such foreclosure, as is stated in the bill. Certainly, not the liens of its creditors, under the 21st section of the chapter.

She could not require the Company to stand by the constitutional amendment (which was the only consideration for its agreement,) while she was "expunging" it.

And besides the reason above given, there was a further reason in the fact that the contract was broken by the State in the very start. *She* was the *first* to neglect and refuse to perform the obligations by it imposed upon her; though the company had performed those imposed upon it. This was so adjudged by the Supreme Court, in the Mandamus Case, more than a year before the alleged default of the Company. 2 *Minn.*, 15. This Court cannot now say that the default, if any, of the Company, was not caused by this prior default and wrong of the State.

And because the State was only one co-equal bondholder under the trust deed, she could not acquire the interests of the other bondholders *for nothing*. All she could acquire by such proceedings was, the remaining interest of the Company; that is, its equity of redemption or right to the surplus of the trust fund. And because the State purchased without payment, or provision for payment to other co-equal bondholders, she took charged with their equities.

Fifthly. The foreclosure *was not* and *could not* be consummated —because there was no appropriation of money made to pay the Governor's bid. It was not in fact ever paid.*

*Abstract, page 21, f. 56; ib., p. 23, f. 61. Record p. 73, f. 129

Upon the theory that such sale extinguished the corporation debtor—it could not be paid to it—and there was no law providing for payment to any one else, or distribution to stockholders, or creditors.

There was no debt nor such liquidated liability, (if any at all), from the Company to the State, which could be offset, or substituted as a payment, and no provision for such offset or substitution; on the contrary, the State repudiated all liability, and was at the same time engaged in "expunging" the contract, which was the only consideration for the obligation of the Company, the breach of which was her complaint. In fact the repeal or "expungement" of the constitutional amendment had the effect to restore all the State had attempted to acquire under that amendment, for a party cannot rescind a contract without placing the other party in *statu quo*.

This alone was enough to estop the State from dealing so strictly with the Company for a subsequent default by it.

Sixthly. The said foreclosure and sale were not made within *sixty days* after the occurrence of the default.*

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The sum of this last part of the argument is,

BECAUSE THE STATE WAS BUT ONE OF THE BONDHOLDERS, "ON AN EQUAL FOOTING ONLY WITH THE OTHERS," SHE COULD NOT DESTROY OR APPROPRIATE TO HERSELF ONLY, THE SECURITY OF THE OTHERS WITHOUT COMPENSATION.

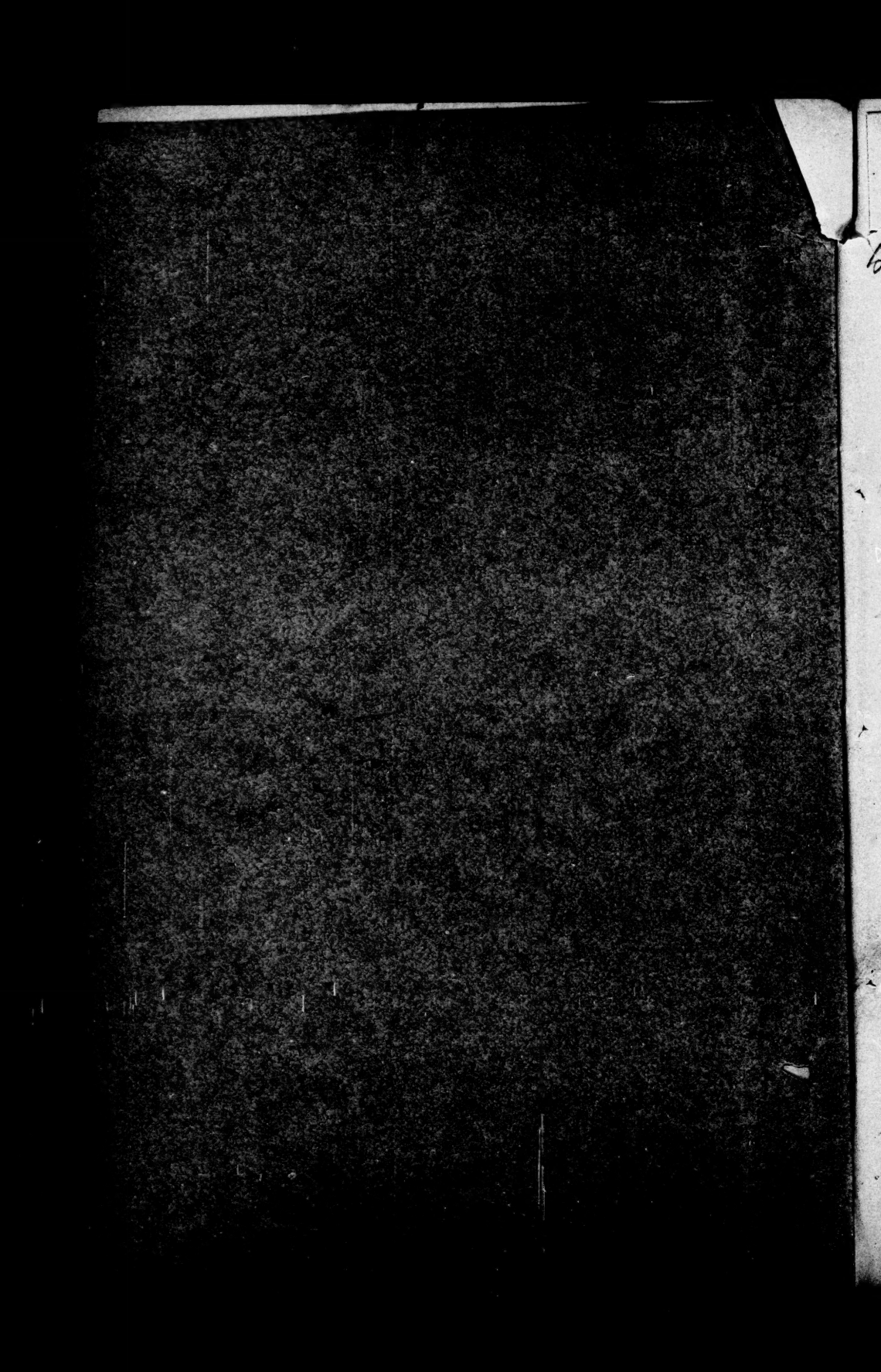
There is no pretence here, that the trust deed, or bonds, were made or issued without *legislative* authority, or *bona fide consideration;* and we respectfully ask this question—if in such case there is any way in which the obligation of payment may be avoided, what safety is there in buying any railroad bond issued before the construction of the road, to borrow money for its construction ; or we may add, any corporation bond whatever?

It seems to us, that upon the theory of the respondents, no "security" *secures* a debt against the machinations of the borrower.†

*Abstract, p. 17, f 43 and 44; ib., pp. 21-22, f. 57-9. Record h, 62 + h 78-9

†(NOTE.) Here it may be well to read the Abstract, pp. 26-7, f. 69-72. Record h 87-8

Henry F. Masterson
Counsel for Appellants



In the Supreme Court

OF THE UNITED STATES.

No. 164.

ELON FARNSWORTH AND EDWARD P. COWLES,
TRUSTEES, &C.,
Appellants,

vs.

THE MINNESOTA & PACIFIC RAILROAD COMPANY AND OTHERS,
Respondents.

POINTS FOR RESPONDENTS.

WM. H. SCOTT,
Of Counsel for Respondents.

NEW YORK:
EVENING POST STEAM PRESSES, 208 BROADWAY, CORNER FULTON STREET.
1876.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

U. S. Supreme Court.

ELON FARNSWORTH, ET AL., Trustees,
Appellants,

against

THE MINNESOTA & PACIFIC RAILROAD COMPANY, ET AL.,
Appellees.

POINTS FOR APPELLEES.

First.—As respects the lands granted to the Territory or State of Minnesota, by the Congressional grant of March 3d, 1857, and by the Territory to the Minnesota & Pacific Railroad Company, by the Territorial Act of May 22d of the same year, the bill of complaint wholly fails to make out any case for the establishment of the lien claimed by the plaintiffs, as trustees, under the trust deed executed to them by the Minnesota & Pacific Railroad Company, dated July 31, 1858; for the decisive reason that the title assumed to be conveyed by such deed of trust was never *vested* in the com-

pany; and the conveyance, consequently, never became operative or effectual, in respect to such lands.

In support of this point, it is only necessary to refer to the recent decision of this Court in the case of Schulenberg *v.* Harriman (21 Wallace, 44); in which case the Court, being called upon to construe both a congressional land grant to the State of Wisconsin, in identical terms with the grant to the Territory of Minnesota, under consideration, and also a grant of the State of Wisconsin to the St. Croix & Superior Railroad Company, in similar terms to the grant of the Territory of Minnesota to the Minnesota & Pacific Railroad Company, under Consideration, decided squarely:—

1. That, under the Congressional grant (*in hæc verba*), though a grant *in presenti*, the State of Wisconsin acquired no power to convey the lands, beyond one hundred and twenty sections, except as the road, in aid of which the grant was made, was constructed. Says the court:—

"The position that, if the acts of Congress vested in the State a title to the lands designated, that title was transferred by the act of its Legislature, passed March 10th, 1869, is equally untenable. The State, by the terms of the grants from Congress, possessed no authority to dispose of the lands, beyond one hundred and twenty sections, *except as the road in aid of which the grants were made was constructed.* The company named in the act never constructed any portion of such road, and there is no evidence that the State ever exercised the power to sell the one hundred and twenty sections authorized, in advance of such construction. The acts of Congress made it a condition *precedent* to the conveyance by the State of any other lands, that the road should be constructed in sections of not less than twenty consecutive miles each. No conveyance in violation of the terms of those acts, the road not having been constructed, could *pass any title* to the company" (id., p. 59).

2. That, even if the State of Wisconsin had obtained by the grant from Congress an unrestricted power of disposition and right of conveyance, it did not pass the title to any part of the lands to the railroad company, by the statute under construction; the court saying:

"Besides, it is evident, notwithstanding the words of transfer to the company contained in the first part of the nineteenth section of the act of the State, that it was not the *intention* of the State that the title should pass, *except upon the construction of the road.* Its concluding language is 'upon the construction and completion of every twenty miles of said railway the said company shall acquire the fee simple absolute in and to all that portion of the land granted' to the State, appertaining to the portion of the railway so constructed and completed" (id., pp. 59, 60).

(*a.*) The grant by the State of Wisconsin to the St. Croix & Superior Railroad Company was as follows:

"For the purpose of aiding in the construction of the railway hereby incorporated, the State of Wisconsin hereby transfers unto said company all the rights, title and interest and estate, legal or equitable, now owned by the State in the lands heretofore conditionally granted to the St. Croix & Superior Railroad Company, for the construction of a railroad and branches, and does further grant, transfer and convey unto the said railway company * * * the possession, right, title, interest and estate which the said State of Wisconsin may now have or shall hereafter acquire of, in or to any lands, through gift, grant or transfer from the United States, or by any act of the Congress of the United States, amending 'An Act granting a portion of the public lands to the State of Wisconsin to aid in the construction of a railroad approved June 3d, 1856,' and the act or acts amendatory thereof, or by any future acts of the Congress of the United States, granting lands to the State of Wiscon-

sin, so far as the same may apply to, and in the construction of a railroad from Bayfield, in the county of Bayfield, in a southeasterly direction, to the intersection of the main line of the Northern Wisconsin Railway, from the lake or river St. Croix to Superior, to have and to hold such lands, and the use, possession and fee in the same, upon the express condition to construct the herein described railway within the several terms and spaces of time set forth and specified in the next preceding section of this act, *and, upon the construction and completion of every twenty miles of said railway, the said company shall acquire the fee simple absolute in and to all that portion of lands granted to this State, in any of the ways hereinbefore described, by the Congress of the United States, appertaining to that portion of the railway so constructed and completed.*"

(*b.*) The grant by the territory of Minnesota to the Minnesota & Pacific Railroad Company was as follows:

"Section 16. For the purpose of aiding in the construction of the railroads hereby authorized, all the interest and estate, present and prospective, of this Territory, and of the future State which shall succeed it, in or to any or all the lands granted by the Government of the United States to the Territory of Minnesota, for the purpose of aiding in the construction of a railroad from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the fort of Big Stone lake and the mouth of the Sioux Wood river, with a branch over St. Cloud and Crow Wing, to the navigable waters of the Red river of the north, to the point hereinbefore mentioned, agreeably to the terms of an act of Congress entitled 'An Act making a grant of land to the Territory of Minnesota in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands in alternate sections to the State of Alabama, to aid in the construction of a certain railroad in said State,' approved

March 3d, 1857; together with all and singular the rights, privileges and immunities conferred or intended to be conferred by said act of Congress, are hereby granted to said Minnesota & Pacific Railroad Company, conditioned that said land shall be exclusively applied to the construction of that road for which it was granted; *and provided* that the title of said land shall vest in the said Minnesota & Pacific Railroad Company, in the manner following, that is to say: whenever twenty or more continuous miles of said road shall have been located, the governor of the Territory or future State shall certify the same to the Secretary of the Interior, and thereupon the title to one hundred and twenty sections of said lands shall vest in the said company; and when twenty continuous miles of said road shall have been completed so as to admit of running regular trains on the same, the Governor of the Territory or future State shall certify the same to the Secretary of the Interior, and thereupon a further quantity of one hundred and twenty sections of said lands shall vest in said company, until said roads are completed; and it shall be the duty of the Governor so to certify to the Secretary of the Interior whenever any such twenty miles are completed, so as to admit of running regular trains of cars over the same, and the Governor shall in his official capacity, and on behalf of the Territory or State, and under the great seal thereof, execute and deliver to the said Minnesota & Pacific Railroad Company whenever it shall, by virtue of the provisions of this act, be entitled to any of said lands, a deed in fee simple of any and all of the lands to which said company shall be entitled."

Second.—But conceding, for the sake of the argument, that, at the date of the mortgage to the plaintiffs, the Minnesota & Pacific Railroad Company possessed

a mortgageable interest in the lands granted by Congress to the Territory of Minnesota, as well as in its franchises, and present and future property and acquisitions; still, all such lands, franchises and property became *forfeited* to the State of Minnesota, under the Constitutional Amendment of April 15th, 1858; by reason of the non-completion of any part of its road, pursuant to the following express provision of such amendment, viz.:

"Provided, that, in consideration of the loan of State credit herein provided, that the company or companies which may accept the bonds of the State in the manner herein specified, shall, as a condition thereof, each complete not less than fifty miles of its road on or before the expiration of the year 1861, and not less than one hundred miles before the year 1864, and complete four-fifths of the entire length of road before the year 1866; and any failure on the part of any such company to complete the number of miles of its road or roads, in the manner and within the several times herein prescribed, shall *forfeit to the State all the rights, title, and interest, of any kind whatsoever, in and to any lands, together with the franchise connected with the same not pertaining or applicable to the portion of the road by them constructed, and a fee simple to which has not accrued to either of said companies by reason of such construction, which was granted to the company or companies thus failing to comply with the provisions hereof, by act of the Legislature of the Territory of Minnesota, vesting said land in said companies respectively.*"

This forfeiture is a complete bar and defense to the present action, upon each of the following distinct grounds, viz.:

I.—Upon the ground that the Constitutional Amendment, and the company's acceptance of the same, and receipt of State bonds thereunder to the amount of six hundred thousand dollars, amounted, together, to an amendment of the charter of the company, with its own

consent, by the incorporation therein of the above quoted provision of forfeiture in the Constitutional Amendment.

1. Although it is settled by the decision of this Court, in the Dartmouth College and other cases, that no alteration of the charter of a corporation can be made by any State Legislature, impairing the obligation of the charter; yet this rule is laid down with this express qualification, viz., that such alteration must be attempted to be made "*without the consent of the corporation.*"

(*a.*) The decision in the case of the Trustees of Dartmouth College (4 Wheat., 518) proceeded upon the express finding of the jury, "that at the annual meeting of the faculty of Dartmouth College, constituted agreeably to the letters patent aforesaid, and in no other way or manner, holden at said college on the 28th day of August, A. D. 1816, the said trustees voted and resolved, and caused the said vote and resolve to be entered on their records, that they *do not accept* the provisions of the said Act of the Legislature of New Hampshire of the 27th of June, 1816, above recited; but do, by the said vote and resolve, *expressly refuse to accept or act under the same*" (id., p. 544).

(*b.*) In his celebrated argument in this case, Mr. Webster states the question involved, in these words:

"The general question is whether the acts of the 27th of June and of the 18th and 20th of December, 1816, are valid and binding upon the rights of the plaintiffs, *without their acceptance or assent.*"

(*c.*) Says Marshall, C. J., in his opinion: "The majority of the trustees of the college have *refused to accept* this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated (p. 627).

Says Washington, J.: "In the case of King *vs.* Passmore (3 T. R., 246) Lord Kenyon says that an existing corporation cannot have another charter obtruded upon it by the crown. It may reject it, or accept the whole, or any part of the new charter. The reason is obvious. A charter is a contract, to the validity of which the consent of both parties is essential, and, therefore, it cannot be altered or added to, *without such consent*" (p. 663).

Says Story, J.: "In my judgment, it is perfectly clear that any act of a legislature which takes away any power or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons *without its assent*, is a violation of the obligations of that charter" (p. 712).

Irrespective of the particular language employed by the court, the same result necessarily follows from the proposition upon which the decision proceeded, as its fundamental idea and basis, viz.: that the charter was a *contract*, and, therefore, inviolable, under the tenth section of the first article of the Constitution of the United States.

2. In the case of The Trustees of Dartmouth College *vs.* Woodward, considerable importance was attached by the court to the fact that the grant to Dr. Wheelock was "a contract made on a *valuable consideration*" (see opinion of Marshall, C. J., p. 644; opinion of Story, J., p. 684).

In the present case, the consent of the company to the amendment of its original charter, by the constitutional amendment, was obtained by the direct payment of a very large consideration, viz.: the issue of State bonds to the amount of six hundred thousand dollars.

3. Viewing the grant to the company, by its original

charter, as a *contract* between the company and the State of Minnesota, there would seem to be no reason, upon principle, why, like any other contract, it should not be subject to alteration or modification, to any extent, and at any time, at the will of the parties.

4. If the ancient rule of the common law is still in force, viz.: that "as to things *executed* a condition must be created and annexed to the estate at the time of the making of it, not at any time after" (Greenleaf's Cruise, vol. 2, title xiii, p. 4), the present case, even viewed as a case between *individuals*, is still within the distinction, in respect to the application of this rule, laid down by Coke (Inst., 236b); where he says, in regard to conditions of defeasance: "There is a diversity between inheritances *executed* and inheritances *executory*; as land executed by livery, &c., cannot by indenture of defeasance be defeated afterwards. And so if a disseissee release to a disseissor, it cannot be defeated by indentures of defeasance made afterwards; but at the time of the release or feoffment, &c., the same may be defeated by indentures of defeasance; for it is a maxim in law, *Quae incontinenti fiunt in esse videntur*. But rents, annuities, *conditions*, warranties, and such like, that be inheritances *executory*, may be defeated by defeasances made, either at that time, or any time after; and so the law of *statutes*, recognizances, obligations, and other things executory." Now, the grant to the company was entirely conditional upon the completion of the road in the manner required by the act; and, therefore, the estate and interest of the company a purely "executory inheritance," within the terms of the foregoing passage from Coke.

5. But, even if the foregoing technical rule of the common law could be held to apply to any case of a grant —not from an individual, but from a State—its application to the present case is entirely superseded by the effect of the Constitutional Amendment; which, in

this respect, was clearly an *enabling* act; permitting the engrafting of the condition and forfeiture upon the charter of the company, notwithstanding any rule or disability of the common law.

6. And the State was not only competent to engraft this new condition upon the former act, with the assent of the company, but such condition was a proper and even a necessary condition, and one looking to the interests of both the company and the State; in expediting and assisting the construction of the road by the combined efforts of both the State and the company, and thus aiding to save the grant from the forfeiture and reversion to the General Government, provided by the act of Congress, in case of the non-completion of the whole road within the time prescribed thereby, viz., ten years from the date of the Congressional grant.

II.—The forfeiture is, moreover, maintainable upon strictly *equitable* grounds.

1. Because such was the express contract of the parties; and a contract based upon a good, valuable and adequate consideration.

As respected the State, the company was a mere *donee*, and a *double* donee; being the recipient, not only of a most liberal grant, both of franchises and of lands, donated in the largest terms; but also of a grant in the extraordinary form of a loan of the credit of the State; upon the sole condition that the company should proceed with the construction of the road with the expedition required by the Territorial and State grants.

Now, these grants, in connection with their acceptance by the company—as this Court has repeatedly held, and as the complaint repeatedly alleges (fols. 42, 45)—amounted to contracts between the State and the company, transferring large considerations from the State

to the company, and involving, like all contracts, mutual and reciprocal obligations between the parties. What, then, was the obligation of the company? Was it to receive the grants of the State, and use and exhaust them as pure gifts and gratuities? Or for counter considerations—for a *quid pro quo?* Clearly for the latter; not merely in justice to the people of the State—from whom, by the grant, the State had alienated the congressional lands, and upon whom, by the Constitutional Amendment, it had imposed the actual burden of the debt incurred—but, also, in justice to the General Government; whose trustee the State was to employ the congressional gift in such a manner, and with such a discretion, as would effectuate the purpose of the gift, viz., the development of the country, by the completion of the road within the time appointed and limited by the Congressional grant. And this the company, by the strongest sort of an implied covenant, undertook to do, as its part of the *contract;* and not merely to *build* its road, but to *complete* it, and run it as a public highway, within the time appointed. It was a case where time was of the very essence of the contract; whether reference be had to the obligations of the State to the General Government,—to the forfeiture reserved in the Congressional grant,—to the duty of the State to its own citizens,—to the relief of the State from the obligations which it had assumed for the benefit of the company, and of which it could only be relieved by the earnings of a *completed* and *running* railroad. Now, how did the company fulfil *its* part of this *contract?* It was active in the matter of receiving; prompt in the filing of documents of acceptance of the franchises and lands granted by the Territory; eager to receive its share, and more than its share, of the State bonds. But here its activity ended. At the end of the year it was flat on its back; "had laid down the shovel and the hoe"; and, in the language of the complaint had "suggested" to its contractor "that the said work should be postponed and

said contract abandoned." Meanwhile, the time limited by the act of Congress was running, and the grant was lapsing, both to the company and to the State. What was the attitude and action of the State in this emergency—that of harshness and severity; of obstruction and complaint; of attempted forfeiture and resumption of the grant? Just the reverse. Instead of complaining, as it justly might have done, at a default which was likely to be attended with such loss to itself, the State came with alacrity to the assistance of the company and the rescue of the enterprise, by a pledge of its own credit; exacting merely, by way of security against *further* default, a provision in the Constitutional Amendment (which should have been incorporated on the original grant), that if, notwithstanding the loan of the State credit, the company should by further supineness and inaction again endanger the Congressional grant, the State should be at liberty to resume and protect the grant, as it might be advised. This was the sole effect of the forfeiture. Now, upon what principle of *equity* is the forfeiture to be disallowed? Upon what ground will a court of equity interfere to disturb a result so just in itself—so necessary to the security of one of the parties to the *contract*—sustained by such unusual considerations,—agreed to with such full formalities?

2. The forfeiture will be sustained and upheld by the Court, because the thing to be secured by the forfeiture, viz., the completion of its road by the Minnesota & Pacific Railroad Company within the time prescribed in the Constitutional Amendment, was not a *collateral* or *incidental* object of the amendment; but the principal, and, indeed, the exclusive purpose of the instrument: and, especially, because any default of the company, in this respect, was one which admitted of no *compensation*, or *restoration* of the *status in quo*.

In Story's Equity Jurisprudence the rule upon this subject is laid down as follows, viz.:

"The general principle now adopted is, that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered the principal intent of the instrument, and the penalty is deemed only as accessory, and, therefore, as intended only to secure the due performance thereof, or the damage really incurred by the non-performance. In every such case, the true test (generally, if not universally,) by which to ascertain whether relief can or cannot be had in Equity, is to consider whether compensation can be made or not. If it cannot be made, then Courts of Equity will not interfere. If it can be made, then, if the penalty is to secure the mere payment of money, Courts of Equity will relieve the party, upon paying the principal and interest. If it is to secure the performance of some collateral act or undertaking, then courts of equity will retain the bill and will direct an issue of *quantum damnificatus*: and, when the amount of damages is ascertained by a jury, upon the trial of such an issue, they will grant relief upon the payment of such damages."

2 Story Eq. Juris., § 1314.

Again:

"The true foundation of the relief in Equity, in all these cases, is, that, as the penalty is designed as a mere security, if the party obtains his money, or his damages, he gets all that he expected, and all that, in justice, he is entitled to."

Id., § 1316.

Again, "It is clearly established that Courts of Equity will not interfere, in cases of forfeiture for the breach of covenants and conditions, where there cannot be any just compensation decreed for the breach. Thus, for example, in the case of a forfeiture for the breach of a covenant, not to assign a lease without license, or to keep leasehold premises insured, or to renew a lease

within a given time, no relief will be given; for they admit of no just compensation or clear estimate of damages."

Id., § 1324.

The application of the foregoing rule, to the present case, would seem to be clear and decisive. The completion of its road, within the prescribed time, was not an *incidental* or *collateral* undertaking on the part of the Minnesota & Pacific Railroad Company; but was the *only* thing to be done by it—the *single* and *exclusive* consideration to be given by it, in return for the loan of the State credit. True, it was to give security, and in the form of a money obligation. But this it was to give, not for the completion of the road, but for the payment of the State bonds.

The *only* security held by the State, for the *completion of the road*, was the *forfeiture*. It is, therefore, absurd to say that the forfeiture was "inserted merely to secure the performance or enjoyment of a *collateral* object," or that the forfeiture is to be "deemed only as *accessory*." On the contrary, instead of being a mere "accessory," the forfeiture, in the language of the foregoing authority, must be "considered as the *principal intent of the instrument*."

But whether its object were direct or collateral, principal or secondary, it is clear that the case is one which admitted of no *compensation*, for the breach by the company of its implied covenant to complete the road within the time limited; for the reason that no compensation, which could be tendered or made by the company, could save the lands from reverting to the General Government, or the grant to the State from being entirely defeated, by the breach. The present case is, therefore, directly covered by the language of the Lord Chancellor in the leading case of Peachy *v.* The Duke of Somerset (1 Strange, 477, 453), *viz.*: "The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only

to secure money, and the court gives him all that he expected or desired, but it is quite otherwise in the present case. Those penalties or forfeitures were never intended by way of *compensation*, for there *can be none*."

3. The forfeiture will be sustained by the court, because it was a forfeiture imposed by *statute*.

"Where any penalty or forfeiture is imposed by *statute* upon the doing or omission of a certain act, there *Courts of Equity, will not interfere to mitigate the penalty or forfeiture, if incurred; for it would be in contravention of the direct expression of the legislative will* The same principle is generally (perhaps not universally) applied to cases of forfeiture founded upon the customs of manors, and the general customs of certain kinds of estates, such as copyholds; for, in all these cases, the forfeiture is treated as properly founded upon some positive *law*, or some customary regulations, which had their origin in sound public *policy*, and ought to be enforced for the *general* benefit" (Story's Eq. Juris., § 1326).

In Peachy *v.* The Duke of Somerset (1 Strange, 447), it is laid down that "cases of agreement and conditions of the party and of the laws are certainly to be *distinguished;* you can never say that the *law* has determined hardly, but you may that the party has made a hard bargain."

In Keating *vs.* Sparrow (1 Ball & By., 373), says Lord Chancellor Manners: "It has been argued on the part of the plaintiff that this Court leans against forfeitures, if the party can be compensated; and that he can find in this case where interest and septennial fines may be given to the landlord. That principle is applicable to cases of *contract* between the parties, but not to the provisions of an *act* of *parliament* or conditions in *law*. In Peachy *v.* The Duke of Sommerset, Lord Macclesfield makes this distinction, and says: 'Cases of agreement and condi-

tions of the party and of the *law* are certainly to be distinguished. You can never say the law has determined hardly, but you may that the party has made a bad bargain. The true ground of relief against penalties is where, from the original intent of the case, the penalty is only designed to secure the money.' Taking, then, the principle from Lord Macclesfield, it is manifest that in cases of mere *contract* between parties, this Court will relieve when compensation can be given, *but against the provisions of a statute no relief can be given.*"

4. The forfeiture will be sustained, upon considerations of *public policy*; upon the same principle upon which courts of equity have refused to relieve against forfeitures incurred under the by-laws of corporations, for the non-payment of stock subscriptions.

"It is upon grounds somewhat similar, aided also by considerations of *public policy*, and the necessity of a prompt performance, in order to accomplish *public* or *corporate* objects, that Courts of Equity, in case of the non-compliance by stockholders with the terms of payment of their instalments of stock at the times prescribed, by which a forfeiture of their shares is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture. The same rule is, for the same reasons, applied to cases of subscriptions to government loans, where the shares of the stock are agreed to be forfeited by the want of a punctual compliance with the terms of the loan, as to the time, and mode, and place of payment."

2 Story, Eq. Juris. § 1325.

In the case of Sparks *v.* Liverpool Water Works Company (13 Ves., 428), the plaintiff was the owner of shares of the stock of the company upon which payments had been made upon thirty-four calls. The payment of the thirty-fifth call was omitted, through

the failure of the plaintiff to receive personal notice of the call; which was sent to his town residence during the month of October—he being then at his house in the country—and the letter containing the call not having been forwarded. Upon this ground the shares were declared forfeited; although the plaintiff had the money with his banker to pay the call at the time it was made, and sent the amount to the bankers of the company, the next day after his receipt of the call, upon his return to the city. Upon filing a bill for relief against the forfeiture on the grounds of accident, that compensation might be had, and that no injury had been sustained by the default, the bill was dismissed (but without costs as a hard case); for the reason that the enterprise was a public undertaking, and that relief must be denied upon grounds of public policy and convenience.

In the same case, the Master of the Rolls (Sir William Grant) afterwards mentioned the instance, in Ireland, of a person who, after having paid some instalments on a loan, neglected to make a further payment, and forfeited the instalment he had paid. He petitioned Parliament for relief, but without success.

5. The forfeiture will be sustained, because the case was one where *time* was emphatically of the *essence of the contract.*

We have already shown the vital importance of the completion of the road of the Minnesota & Pacific Railroad Company, within the time limited by the Congressional grant, not only to the State of Minnesota, but to the Company itself, as well.

It was to secure that end, not so much as a mere *desideratum*, as a matter of absolute *necessity*, and to prevent the *lapsing* of the grant, that the provision of forfeiture was inserted in the Constitutional Amendment; and, as we have seen, became, by the Company's acceptance of the amendment, incorporated into its original charter.

This being so, the present case is directly covered by the decision of the Supreme Court of Vermont, in the case of Dunklee *v.* Adams (20 Vermont, 415); in which case it was held that "the Court of *Chancery* will not relieve against a forfeiture of an estate declared at law, where the condition, for the breach of which the forfeiture has been declared, consists in the performance of services and attentions for the personal comfort and convenience of the party claiming the forfeiture; in such a case the *time* for the performance of the service is of the *essence* of the *contract*, and it is impossible to put the party in the precise situation in which he would have been if the condition had been performed."

Says the court (p. 421): "It now appears to be the established doctrine that relief will *only* be granted when the breach of the condition is for the non-payment of *money*; and it is granted in such cases on the principle that the allowance of interest for the delay forms a certain rule of compensation and is equivalent to payment at the day."

In the recent case of Baldwin *v.* Van Vorst (2 Stock. Ch., 517), where the question arose on a condition for payment in ten years, but with a proviso that if the interest were not paid punctually, the whole debt should be due and payable at once, the court refused to relieve against a forfeiture incurred by the non-payment of interest; on the ground that the parties had made *time* of the *essence* of the *contract*, and that Equity could not interfere without doing violence to the spirit, as well as the letter of their agreement.

3 Leading Cases in Equity, 672.

6. The forfeiture will also be sustained on account of the admitted insolvency of the Minnesota & Pacific Railroad Company, at the time the forfeiture was asserted and declared by the State of Minnesota, by the Act of the State Legislature of the 10th of March, 1862; and of its conceded and notorious inability to

complete the road as required by the Constitutional Amendment, and the acts of the parties thereunder.

Dunklee *v.* Adams (20 Vermont, 421).

Third.—In so far as the present action seeks to establish a lien in favor of the plaintiffs, as trustees, upon the railroad constructed, and the property and appurtenances acquired by the *St. Paul & Pacific Railroad Company*, it must wholly fail of its purpose; for the reason that there is no *privity* whatever between the Minnesota & Pacific Railroad Company and the St. Paul & Pacific Railroad Company, in respect to the railroad, property, or acquisitions of the latter company.

I.—Although it must now be regarded as the settled doctrine of this Court, that a mortgage executed by a Railroad Company, conveying and covering its subsequently acquired property, will render such property subject to the mortgage, *pari passu* with its acquisition; yet, it is equally well settled in this Court, that this is so only "as against the Company and its *privies;*" and only as fast as the property covered by the terms of the mortgage, "comes into existence as property of the *Company.*"

Galveston Railroad *v.* Cowdrey, 11 Wallace, 459.

II.—And even this doctrine is somewhat of an innovation upon the established maxim of the Common Law—that "a person cannot grant a thing which he has not" (*ille non habit non dat*)—which has been allowed, in regard to railroad mortgages, upon considerations compounded both of *equity* and of *public policy;* and is, therefore, not to be extended by the courts.

III.—The St. Paul & Pacific Railroad Company is in no *privity* whatever with the Minnesota & Pacific Railroad Company; deriving its title to all its property and franchises, not as the grantee of the Minnesota & Pacific Railroad Company, but by a grant from the State of Minnesota in *hostility* to, and in *forfeiture* of the title of the Minnesota & Pacific Railroad Company.

IV.—Still less is the Minnesota & Pacific Railroad Company the same company as the St. Paul & Pacific Railroad Company. This has been expressly adjudicated by the highest local court of the State of Minnesota.

V.—And, according to the settled rule, this determination of the highest court of Minnesota—involving, as it does, a direct construction of the object and effect of an Act of the State Legislature—will be adopted and followed by this Court.

Fourth.—The judgment below should be affirmed.

WM. H. SCOTT,
For Appellees.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1875.

No. 164.

ELON FARNSWORTH AND EDWARD P. COWLES,
APPELLANTS,

vs.

The Minnesota & Pacific Railroad Company, The St. Paul & Pacific Railroad Company, The First Division of the St. Paul & Pacific Railroad Company, The Stillwater & St. Paul Railroad Company, The Northern Pacific Railroad Company, Edmund Rice, Trustee, &c., Horace Thompson, Trustee, &c., Geo. L Becker, Trustee, &c., William G. Moorhead, Trustee, &c., Samuel M. Felton, Trustee, &c., Jay Cooke, Trustee, &c., and J. Edgar Thompson, Trustee, &c.,
RESPONDENTS.

APPEAL FROM THE U. S. CIRCUIT COURT FOR THE DISTRICT OF MINNESOTA.

RESPONDENTS' BRIEF.

H. R. BIGELOW, } Of Counsel for Respondents.

Supreme Court of the United States.

ELON FARNSWORTH AND EDWARD P. COWLES,
Appellants,

vs.

The Minnesota & Pacific Railroad Company, The St. Paul & Pacific Railroad Company, The First Division of the St. Paul & Pacific Railroad Company, The Stillwater & St. Paul Railroad Company, The Northern Pacific Railroad Company, Edmund Rice, Trustee, &c., Horace Thompson, Trustee, &c., George L. Becker, Trustee, &c., William G. Moorhead, Trustee, &c., Samuel M. Felton, Trustee, &c., Jay Cooke, Trustee, &c., and J. Edgar Thompson, Trustee, &c.
Respondents.

RESPONDENTS' BRIEF.

The general propositions to which the argument in behalf of the Respondents is addressed in this case, may be briefly stated as follows:

By the constitutional amendment of April 15th, 1858, and its acceptance by the Minnesota and Pacific Railroad Com-

pany, the entire grant—both lands and franchises—with which that Company had been clothed and endowed by the act of the Legislature of May 22d, 1857, became a grant upon conditions subsequent, prescribed and established by said amendment.

Among the conditions thus annexed to the grant was one, that the Company should *complete* not less than fifty miles of its road on or before the expiration of the year 1861; and for failure of such condition, it was provided that all the right, title and interest of the Company, of any kind whatsoever, in and to any lands which had been so granted to it, together with the franchises connected with the same, and a fee simple to which should not have accrued to it by reason of such construction, should be forfeit to the State.

The mortgage deed to trustees, under which the plaintiffs now claim, having been executed after such amendment, and its acceptance by the Company was, of course, made subject to such condition and forfeiture, and with an inherent liability to be thereby destroyed.

The Company did not, on or before the expiration of the year 1861, or ever, complete fifty miles of its road, or any of it; and the State, by the act of March 10th, 1862, declared the forfeiture and resumed the grant—including the roads, lands, and franchises—transferring all to other parties; and thus effectually and forever barred the Company, and the trustees as well, of and from any and all claim to such roads, lands, and franchises.

The only escape from this result is in the position that the mortgage deed was *legally* foreclosed by the Governor in the

spring and summer of 1860, so as to leave nothing for the forfeiture to take effect upon; and in such case all claim of the plaintiffs was as effectually barred by the foreclosure as it would otherwise be by the forfeiture.

ARGUMENT.

On third March, 1857, an act of Congress was passed granting to the Territory of Minnesota to aid in the construction of certain railroads within the territory, lands to the amount of six sections per mile, along the lines of such roads; and among the roads thus provided for was one, the lines of which were designated as follows:

"From Stillwater by way of St. Paul and St. Anthony to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch via St. Cloud and Crow Wing to the navigable waters of the Red River of the North, at such point as the Legislature of said Territory may determine."

The grant is contained in the *first* section of the act, which contains also a proviso (among others)—

"That the lands hereby granted for and on account of said roads and branches, severally, shall be exclusively applied in the construction of that road, for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatever."

And by the *third* section it is enacted—

"That the said lands hereby granted to the said Territory or future State, shall be subject to the future disposal of the Legislature thereof, for the purposes herein expressed, and

no other; and the said railroads and branches shall be and remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."

By the *fourth* section, the power of the Territory or future State, with reference to the lands, is limited as follows:

"That the land hereby granted to said Territory or future State shall be disposed of by said Territory or future State only in the manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, and included within a continuous length of twenty miles of each of said roads and branches, may be sold; and when the Governor of said Territory or future State, shall certify to the Secretary of the Interior, that any twenty continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads or branches having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads and branches may be sold; and so from time to time until said roads and branches are completed; and if any of said roads and branches is not completed within ten years no further sale shall be made, and the lands unsold shall revert to the United States."

(*Record, pp.* 2–4.)

On the 19th day of May of the same year, the Territory of Minnesota, by act of her Legislature, accepted the said grant "upon the terms, conditions and restrictions contained in said act of Congress," and assumed and undertook the trust created thereby—*Laws of* 1857, (*Extra Sess.*) *p.* 70; and on the 22d day of the same May, passed the act, of that date, entitled "An act to execute the trust created by an act of Congress entitled," &c., the first chapter of which is the charter of the Minnesota and Pacific Railroad Company, and contains the grant from the Territory to that Company of the lands which

had been so granted to the Territory by Congress, to aid in the construction of the road from Stillwater by way of St. Paul, &c., to a point between the foot of Big Stone Lake and the mouth of the Sioux Wood River, with a branch via St. Cloud, &c., to the Red River of the North ; which road and branch the said Minnesota and Pacific Railroad Company was, by its said charter, authorized to construct and operate.

(*Record, pp.* 5 *et seq.*)

The other routes in aid of which a similar grant of lands was made by the act of Congress, were designated in such act as follows: "From St. Paul and from St. Anthony via Minneapolis, &c." (*See Record, pp.* 2 *and* 3.) And by the Territorial act of May 22d, 1857, such routes and the lands appertaining thereto were assigned and distributed to three other companies, viz., The Transit Railroad Company, The Root River Valley and Southern Minnesota Railroad Company, and The Minneapolis and Cedar Valley Railroad Company.

(*Record pp.* 16, 18 *and* 19.)

The Minnesota and Pacific Railroad Company organized and accepted such charter on the 25th and 27th of May, 1857, and (the bill alleges) entered immediately upon the prosecution of the enterprise, and during the year 1857 surveyed and located the entire line from Stillwater to Breckenridge, on the Sioux Wood River, and that part of the branch line from St. Anthony to Crow Wing, &c.

The grant of lands to the Company, with its conditions and limitations, is contained in the 16th section of its charter, which provides that for the purpose of aiding in the construction of the railroad and branch so authorized, all the interest and estate, present or prospective, of the Territory, or future State which shall succeed it, in and to the lands granted by the act of Congress aforesaid to said Territory,

for the purpose of aiding in the construction of such road and branch—

"Together with all and singular the rights, privileges and immunities conferred or intended to be conferred by said act of Congress, are hereby granted to said Minnesota and Pacific Railroad Company, conditioned that said land shall be exclusively applied to the construction of that road for which it was granted. *And provided*, that said land shall vest in said Company in manner following, that is to say: Whenever twenty or more continuous miles of said road shall have been located, the Governor of the Territory, or future State, shall certify the same to the Secretary of the Interior, and thereupon the title to one hundred and twenty sections of said lands shall vest in the said company; and when twenty continuous miles of said road shall have been completed, so as to admit of running regular trains on the same, the Governor shall certify the same to the Secretary of the Interior, and thereupon a further quantity of one hundred and twenty sections of said lands shall vest in said Company, until said roads are completed."

(*Record, pp.* 11, 12.)

By the eleventh section the Company was authorized and empowered—

"To borrow any sums of money * * * * for any rate of interest which may be agreed upon by and between said Company and any person or party of whom such loan may be obtained * * * * * * ; and to make, execute and deliver all necessary writings, notes, bonds, mortgages or other obligations and securities, in amount and kind as may be deemed expedient by said corporation, in consideration of any such loan, or in discharge of any liabilities which it may incur in the construction, repair, equipment or operating of said road."

(*Record, p.* 8.)

And section twenty-one contained authority—

"To make, execute, issue and deliver its bonds and obligations in any amount which the directors may deem necessary

or expedient; * * * * * and to secure the payment of all or any of said bonds * * * * to make, execute and deliver one or more mortgages or deeds of trust upon the whole or any part of its railroad or branches constructed or authorized to be constructed, and of the estate granted by this act and any or all other of their estate, real, personal, or mixed, in possession, or expectancy."

(*Record, p.* 14.)

It is under these provisions of the charter, that the mortgage (trust deed) now sought to be foreclosed is claimed by the plaintiffs to have been executed. The mortgage was not made, however, nor were any bonds issued or executed by the company until further provisions of law had become applicable to the transaction.

Before the mortgage, or any bonds were executed, the Territorial Government had been superseded and Minnesota had become a State. The State, by an amendment to its constitution, had tendered to this and *other* railroad companies upon whom the Congressional land grant had been bestowed by the Territorial Legislature, certain further benefits; but only upon well defined conditions, to be first accepted by the respective companies.

This amendment (adopted April 15th, 1858,) authorized and required the Governor to cause to be issued and delivered to each of the companies accepting the conditions, the special bonds of the State, (to be denominated "Minnesota State Railroad Bonds") bearing an interest of seven per cent. per annum, payable semi-annually in the city of New York, as a loan of public credit, to an amount not exceeding $1,250,000, in manner following:

Whenever either of said companies should produce to the Governor satisfactory evidence, verified, &c., that any ten miles of its road had been actually constructed and completed

ready for placing the superstructure thereon, the Governor was to cause to be issued and delivered to such company bonds to the amount of $100,000; and whenever thereafter, and as often as any such company should produce to the Governor like evidence of a further construction of ten miles of its road, as aforesaid, then the Governor was required to cause to be issued and delivered to it further like bonds, to the amount of $100,000 for each and every ten miles of road thus constructed; and whenever any such company should furnish like evidence that any ten miles of its road was actually completed and cars running thereon, the Governor was to cause to be issued to it like bonds to the amount of $100,000; and whenever thereafter, and as often as such company should produce to the Governor like evidence that any further ten miles of its road was in operation as aforesaid, the Governor was required to cause to be issued to it further like bonds to the amount of $100,000, until the full amount authorized should be issued.

It was also provided by the amendment as follows:

"Each Company shall make provision for the punctual payment and redemption of all bonds issued and delivered as aforesaid to said Company, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of this State from any advances of money for that purpose; and as security therefor, the Governor shall demand and receive from each of said Companies, before any of said bonds are issued, an instrument pledging the net profits of its road for the payment of said interest, and a conveyance to the State of the first two hundred and forty sections of land, free from prior incumbrances, which such Company is or may be authorized to sell, in trust, for the better security of the treasury of the State from loss on said bonds * * * * * ; and as further security, an amount of first mortgage bonds on the roads, lands, and franchises of the respective companies, cor-

responding to the State bonds issued, shall be transferred to the Treasurer of the State at the time of the issue of State bonds; and in case either of said Companies shall make default in the payment of either the interest or principal of the bonds issued to said Companies by the Governor, no more State bonds shall thereafter be issued to said Company, and the Governor shall proceed, in such manner as may be prescribed by law, to sell the bonds of the defaulting Company or Companies, or the lands held in trust as above, or may require a foreclosure of the mortgage executed to secure the same; *Provided*, That if any Company so in default, before the day of sale, shall pay all interest and principal then due, and all expenses incurred by the State, no sale shall take place, and the right of such Company shall not be impaired to a further loan of State credit; * * * *Provided further*, That in consideration of the loan of State credit herein provided, the Company or Companies which may accept the bonds of the State in the manner herein specified, shall as a condition thereof, each complete not less than fifty miles of its road on or before the expiration of the year 1861, and not less than one hundred miles before the year 1864, and complete four-fifths of the entire length of its road before the year 1866; and any failure on the part of any such Company to complete the number of miles of its road or roads, in the manner and within the several times herein prescribed, shall forfeit to the State all the right, title and interest, of any kind whatsoever, in and to any lands, together with the franchises connected with the same, not pertaining or applicable to the portion of the road by them constructed, and a fee simple to which has not accrued to either of said Companies by reason of such construction, which was granted to the Company or Companies thus failing to comply with the provisions hereof, by act of the Legislature of the Territory of Minnesota vesting said lands in said Companies respectively."

(*Record, pp.* 27–29.)

The Minnesota and Pacific Railroad Company, in due time, about June 1st, 1858, accepted the amendment, and notified the Governor of such acceptance in the manner therein pre-

scribed, and thus subjected its lands, property, rights and franchises to all the conditions thereby imposed.

That the Company was competent to subject all or any of the rights, franchises, lands and property granted to and conferred upon it by the act of May 22d, 1857, to such conditions as against itself, there can be no doubt; and the mortgage in suit not having been made until after the Company had so actually subjected all of such rights, franchises and property, it is equally clear that the conditions thus annexed underlie, and take precedence of, any and all claim under such mortgage.

The Company, after having so accepted the provision made for it by said amendment, with the conditions thereto attached, actually received of the loan thus authorized, bonds of the State to the amount of $600,000. One of such conditions, exacted by the State and deliberately accepted by the Company before the issue of any such bonds, was,—that the Company should *complete not less than fifty miles of its road on or before the expiration of the year* 1861, (and further portions within times therein prescribed.) And that a failure so to do, within the times prescribed, should *forfeit to the State, all its right, title and interest of any kind whatsoever, in and to any lands, granted to it, in and by said act of May 22d, 1857, together with the franchises connected with the same, not pertaining or applicable to the portions of such road by it constructed, and a fee simple to which should not have accrued to it,* BY REASON OF SUCH CONSTRUCTION.

The amendment contained no grant of lands, in addition to that embraced in the act of May 22d, 1857; nor was the Company thereby relieved of any of the terms or conditions annexed to such grant by the said act. Hence, in order that a fee simple to any lands should accrue to it, *by reason of con-*

struction, it was requisite that twenty continuous miles should have been completed so as to admit of running regular trains thereon:—the provisions of that act, with reference to the vesting of title in the Company, being as we have seen, that, when twenty or more continuous miles of the road should have been *located*, the Governor should certify, &c., and thereupon the title to one hundred and twenty sections should vest in the Company, and when twenty continuous miles should have been *completed*, so as to admit of running regular trains thereon, the Governor should certify, &c., and thereupon a further quantity of one hundred and twenty sections should vest in the Company until the road should be completed.

The Company never, in fact, completed any portion of the road; nor is there any allegation in the bill, as we construe it, that it did. It is alleged (*page* 87 *of Record*) that in 1861, "about a quarter of a mile of the track of said road was laid and completed." This is not an allegation that any part of the *road* was completed, nor equivalent to such allegation; but simply that a quarter of a mile of the *track* was laid and completed; and the idea of the entire completion of so insignificant a portion of the road being such as to admit of the running of regular trains thereon, within the meaning of the charter, is too ridiculous for comment.

On the first day of January, 1862, therefore, the title to no part of the lands having then accrued to the Company, *by reason of construction*, the condition upon failure of which, by the terms of the amendment, the Company was to forfeit to the State all right, title and interest of any kind whatsoever, in and to any lands, together with the franchises connected with the same, had failed, and the State had become entitled to assert the forfeiture and resume the grant.

This was subsequently done by the State, by the act of March 10th, 1862, (*Special Laws of* 1862, *page* 247 *et seq.*,) which is set out, in full, at pages 88-93 of record, and referred to at page 27 of Appellant's *Abstract of Case;* and not only the Company, but all parties claiming under or through the Company, by title made subsequent to the date of the amendment—including the plaintiffs and their *cestues que trust*—were thenceforth and thus effectually barred of all interest whatever in such lands and franchises.

This result, however, is questioned on the part of the appellants upon several grounds, among which are the following:

First. That the forfeiture conditions of the amendment were not conditions annexed to the grant, for the reason that the Company derived its title, not through such amendment, but through the act of May 22d, 1857.

Second. That the act of March 10, 1862, was not "*intended* as an enforcement or taking advantage of the condition and forfeiture of the *Constitutional Amendment;*" and

Third. That the State could not, in any event, acquire title by such forfeiture without judicial process and judgment.

In response to the last proposition it is perhaps sufficient to refer to the cases of *United States vs. Repentigny*, 5 *Wallace* 211, 268, and *Schulenberg vs. Harriman*, 21 *ib.* 44, 64.

In the latter case it is said, [the reference therein being to the other:]

"At common law the sovereign could not make an entry in person, and therefore an office found was necessary to determine the estate, but as said by this Court, in a late case, 'the mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation or by taking possession direct-

ly under the authority of the government without these preliminary proceedings.'"

And in the former case it is also said, that "a legislative act directing the possession and appropriation of the land is equivalent to office found."

See also *Smith vs. The State of Maryland*, 6 *Cranh.* 286.

That the act of March 10th, 1862, was *intended* as an assertion of forfeiture, under the constitutional amendment, is obvious upon the most casual reading of its provisions; such is the plain, ordinary and natural meaning of the language used.

The first section is:—

"That all the rights, benefits, privileges, property, franchises and interests of the Minnesota & Pacific Railroad Company, acquired by the State of Minnesota, by virtue of any acts, deeds, agreement, or *thing*, by the said Company heretofore done, or *suffered*, or by virtue of any law of the State *or the constitution thereof*, or of the former Territory of Minnesota, or by reason of any sale of the same or any part thereof, by the Governor of the State, on the 23d day of June, 1860, and bid in and purchased for the benefit of the State, be and the same are hereby granted and transferred to * * * their associates and successors, for the purpose, &c."

And by the second, all the rights, privileges, franchises, lands, property and interests granted by the Territory of Minnesota to the Minnesota & Pacific Railroad Company, by the act of May 22d, 1857, are continued and granted to the same persons named as grantees in the first section, their associates and successors, with all the immunities, rights, property, benefits and privileges, which the said The Minnesota & Pacific Railroad Company had or might or could have by reason of the passage of said act, &c.

By the third section certain conditions are annexed to the grant; and by the fifth it is provided that upon failure of

such conditions, or of any of them, all the rights, benefits, privileges, lands, property and franchises conferred upon the Company by the act (or certain parts thereof, as the case may be,) shall become *forfeited to the State*, absolutely without any judicial or legal proceedings, or any further act or ceremony whatever.

(*Record, pp.* 88 *et seq.*)

If this is not a legislative act directing the possession and appropriation of the lands and franchises, which, it is said in *United States vs. Repentigny Supra*, is equivalent to *office found*, what is it? It grants the entire property, lands and franchises, to a party other than its former grantee, designating the purposes for which it is to be used, and with a condition subsequent, upon failure of which, the property is to revert or become forfeited to the State. A more unmistakable and emphatic assertion of ownership of the property cannot well be imagined; and the property, being described, in the act, as the same which had previously been granted to the Minnesota & Pacific Railroad Company, and the first section reciting among the sources, or grounds, of the claim, any act or thing done or suffered by said company, and any law of the State, *or the Constitution thereof*, leaves no room for doubt that the grounds of such assertion embrace and were *intended* to embrace the constitutional forfeiture.

Coming now to the other of the three grounds above referred to, upon which the constitutional forfeiture claimed by the defendants is questioned by the learned counsel for the appellants, to-wit:—That the forfeiture conditions of the amendment were not conditions annexed to the grant for the reason that the Company derived its title, not through such amendment, but through the act of May 22d, 1857:—

The learned counsel treats this amendment as a mere con-

tract of loan and security, of the same effect (and no other) as if made between private persons; wholly ignoring, in his construction of its forfeiture provisions, its relation to the original charter of the Company, and the fact that it is itself a public law.

That some of its provisions were intended simply to secure the payment of the State bonds thereby authorized, we do not question. The pledge of the net profits of the road; the conveyance of the first 240 sections which the Company should be authorized to sell; and the transfer to the treasurer of the State, by the Company, of its first mortgage bonds to an amount corresponding to the State bonds issued, were of his character.

But such was not the purpose of the provisions for forfeiture. The forfeiture was not made to depend upon the payment or non-payment of the State bonds by the Company, but upon completion of portions of the roads within the times prescribed. Had all such bonds issued been punctually paid by the Companies, principal and interest, as the same became due, the conditions upon which the forfeiture depended would not have been thereby performed, but would have remained precisely as if no such payment had been made; and had the forfeiture conditions been fully and punctually performed, the Companies would not have been thereby relieved of their obligation to pay the bonds.

These two portions of the amendment, the one intended to secure the payment of the bonds, and the other the completion of the roads, are independent each of the other, and must be so construed.

By the latter, whatever title to the *property, lands* and *franchises* enumerated in the charter had originally vested in the

Company by that instrument, without condition (if any) became conditional; and whatever title had been so vested upon condition, became subject to further conditions; and *all* subject to forfeiture, to the extent and in the manner prescribed in the amendment;—and this equally as if such conditions had been enacted by way of direct amendment to the charter and accepted by the Company, or had originally formed part of the charter; otherwise these conditions are empty words, having no office or purpose whatever. To argue that they were intended as a mere bugbear to frighten the Companies into "the immediate resumption and early completion of the construction of these roads" is, we submit (with all deference to the learned counsel for the appellants), trifling with the subject; and the proposition that they constitute a merely executory agreement between the Company and the State, we do not care to spend time upon.

Nor do we regard the suggestions that these conditions are similar to the implied condition in every charter, that the franchises of a corporation shall be diligently used, and that they subject the Company only to the same proceedings for a breach as it would be liable to (whether at common law or by statute,) for *non-user* of its franchises without them, as worthy of serious consideration. The constitution was not amended for the mere purpose of declaring either the common law or the then existing statute law of Minnesota. No such purpose is manifest in the language of the amendment, and from the nature and circumstances of the transaction, certainly none is to be presumed.

The proposition that there is no condition *in deed* here, because the grant is found in the charter of 1857, while the condition is part of the constitutional amendment of 1858

might, *perhaps*, have some force, if each of the two instruments was a mere contract between private individuals. We have here presented, however, not two independent contracts, but one, and only one; changed, it is true, and very essentially, in some of its original features, but so changed, not simply by authority of law, but by the law itself, and with the assent of the parties. It is but one contract; but whether one or two, it is all *law*, and *enacts:*

"That the Company or Companies which may accept the bonds of the State in the manner herein specified, shall, as a condition thereof, each complete not less than fifty miles of its road on or before the expiration of the year 1861," &c. "And any failure," &c. &c., "shall forfeit to the State all the rights," &c., &c, &c.

The authority for, and the law of, this contract is found in the instrument itself; and if such law is not in harmony with any common law rule applicable to contracts, then the rule thus impinged, is, so far as this contract is concerned, to all intents and purposes abrogated.

Schulenberg vs. Harriman, 21 *Wallace*, 44, 62

Congress had made to the State a liberal grant of public lands in trust to aid in the construction of several railroads designating the lands applicable to each, and reserving certain rights in the roads when constructed; providing also that the lands granted for the respective roads should be exclusively applied in the construction of the road for which they were granted; that they should be disposed of only as the work should progress, and that the same should be applied to no other purpose whatever. Good faith on the part of the State in the execution of the trust—to say nothing of her interest in the accomplishment of the enterprises thus fostered—required that she retain and secure such control, not

only over the lands, but over the enterprises, as to insure as far as possible the end contemplated in the grant. It was undoubtedly, in this view that the forfeiture clause was exacted of the Companies, and this end it is well adapted to subserve, and, we may add, has subserved. By it each Company was insured so much road as it should build (in sections of twenty miles) within the times prescribed, and such lands as should accrue to it by reason of such construction; and the State was entitled to resume, in case of the Company's failure to complete any or all of the specified portions within the times prescribed for such completion, all the uncompleted road, with the lands applicable thereto. And thus, should any Company complete its road, or the portions of it specified in the amendment, within the times therein prescribed, the full benefit of its charter and the land grant would be insured to it, as if such amendment had never existed; while in case of failure so to do, the State would be able, by resuming the franchises and lands pertaining to the uncompleted portion, or the whole if twenty miles had not been completed, to seek other agencies or means for the completion of the road through the aid of the land grant applicable thereto; and in case it should be unable so to complete the same, to hold the lands unused for such purpose, for the reverter to the general government provided for in the act of Congress making the grant, at the expiration of ten years from the date of such act.

The learned counsel for the appellants does not stop with the points already considered, against a forfeiture, under the constitutional amendment, but claims that "conceding that this provision for forfeiture was of the nature of condition in deed, and could be taken advantage of without judicial ac-

tion, it still remains true that the State lost the right to it, and barred even the judicial remedy, by her own illegal acts, and first and continued breach of the contract which created the condition ;" and it is claimed by the learned counsel :—

First That the State broke the contract on 5th November, 1858, by refusing to deliver her own bonds in exchange for bonds of the Company secured by the trust deed of July 31st, 1858 ; and again, on 27th November, 1858, by exacting of the Company the supplemental deed of that date, and the stipulation that only one-half of the State bonds, to which the Company might become entitled under the amendment, should be drawn by it upon account of the grading, constructing and completing of its road ready for placing the superstructure thereon.

Second. That she broke it again by refusing to receive the State bonds issued to the Company as a basis for banking under the laws of the State.

Third. That she broke it again on 28th September, 1859, by refusing to issue and deliver to the Company $25,000 more of the State bonds.

Fourth, That she broke it, also, or unlawfully interfered with the Company's rights thereunder :

I. By the joint resolution of her legislature of January 13th, 1860, directing the Governor to destroy the blank unissued Minnesota State Railroad Bonds, and such destruction ;

II. By the act of March 6th, 1860, authorizing a foreclosure of the mortgage, by the Governor, and the foreclosure proceedings which followed.

Fifth. That by the constitutional amendments adopted November 6th, 1860, she *rescinded* the contract ; and

Sixth. That by the act of March 8th, 1861, and its acceptance by the Company, the forfeiture, if any was waived

by the State, and the old contract superseded by mutual agreement of the parties.

Without stopping to inquire into the importance of any of these objections, in case the forfeiture provisions already considered should be held to be in the nature of condition in deed or legislative grant, we will proceed to consider such objections in the order in which we have stated them.

And first, concerning the alleged breach of the compact by the State, through the refusal of the Governor to deliver State bonds to the Company, upon demand, on the 5th of November, 1858, and the exaction by him of the supplemental trust deed, and the stipulation of the 27th of same month.

The trust deed bears date July 31st, 1858, and the bill alleges that it was executed by the Company on that day, and "then and there delivered" to the trustees, who "thereupon then and there * * * accepted the said deed and executed the same as parties of the second part thereto."

(*Record, p.* 30, *fol.* 55, *and p.* 43, *fol.* 77.)

It is usual in pleading to allege the execution of a paper on the day of its date, when the precise day of the execution is unimportant; and the party thus pleading is not thereby precluded from proving the execution on some other day, in accordance with the fact. We do not think it is anywhere alleged, in terms, that this deed was executed *before* the passage of the act of the legislature of August 12th, 1858, nor that such act was not passed until *after* the execution of the deed. We submit, therefore, that it cannot be taken as admitted upon the record, that the deed was in fact executed before the date of the act last mentioned. Indeed, other parts of the bill indicate pretty clearly that such was not the case, for it was not until two months later that the first bond was ready to be issued. Both the trust deed and the bonds

themselves provided in express terms that no bonds should be issued until registered and countersigned by the trustees, nor be valid unless so registered and countersigned. (*Record, p.* 38, *fol.* 70, *and p.* 44, *fol.* 80.) And the first installment of bonds was registered and countersigned and returned to the Company for issue, only on the 28th of September, 1858. (*Record, p.* 45, *fol.* 81.)

The financial affairs of the Company at this time, as disclosed by the bill, were hardly such as to justify or admit of a delay of two months after the execution of the deed, in getting the bonds ready for issue; and such delay in the circumstances is highly improbable.

The deed, too, was not *acknowledged* until the 20th day of September, 1858. (*See Edgerton's Compilation of Railroad Laws, &c., of Minnesota,* 136-154, *where the entire deed with certificate of acknowledgment is given.*) Undoubtedly it was not, *in fact*, executed before the act of Aug. 12th, and clearly no bonds were issued before Sept. 28th.

If made after August 12th, the provisions of the act of that date, so far as they are valid at least, are applicable to it, and the Company and trustees should have conformed it to such provisions. It is averred in the bill (*Record, p.* 48, *fol.* 85) that such "act was never assented to or in any manner accepted" by the Company; yet in the pledge of net-profits made under the constitutional requirement, to secure the payment of the interest on the State bonds, the Company agreed, without any pretense of duress, or suggestion from anybody, to

"Provide and pay to the Treasurer of the State of Minnesota * * * at least *sixty days prior to the first days of the months of June and December* of each and every year * * * a sum of money sufficient to pay the

interest warrants attached to the said bonds of the State of Minnesota * * * said interest warrants maturing * * * upon the first days of the months of June and December in each and every year aforesaid."

(*Record, p.* 49, *fol.* 88.)

And at *page* 48, *fol.* 86 *of Record* it is alleged that the Company had borne and paid one-fourth of the expenses of engraving and preparing the Minnesota State Railroad Bonds, &c.

Here is a distinct recognition of the binding force of the first section of that act, as the obligation of the Company to make that agreement or to bear any part of the expense of engraving or preparing the State Bonds is to be found nowhere else. In the conveyance, too, of the 240 sections of land made also under the amendment "for the better security of the Treasury of the State from loss on said Bonds," this act is distinctly referred to by its title and date of approval, as part of the law, under which such conveyance is made.

(*Record, p,* 53, *fol.* 93.)

These circumstances, we submit, amount to an acceptance of the act by the Company. But, whether it was accepted or not, we are unable to see in it any violation of the provisions of the constitutional amendment, or any infringement of the chartered rights of the Company. The Supreme Court of Minnesota has always treated this act, as well as that of March 6th, 1860, as valid.

1st Div. St. P. & P. Railroad vs. Parcher, 14 *Minn.*, 297, 301-303.

Huff vs. Winona & St. Peter R. R., 11 *Minn.*, 180, 187-8.

If the Company was bound by the provisions of this act of August 12th, then it is clear that the Governor was right in refusing the State bonds when demanded, for the mort-

gage bonds offered in exchange were not of the form or character required; they were not so drawn as that the semi-annual payments of interest thereon, and the final payment of the principal should mature and be payable sixty days before the maturity of the principal or interest of the State bonds, as required by such act (*Record, pp.* 45-6, *fol.* 82-3;) but so as that the interest would not mature until four months *after* the maturity of the interest on the State bonds. [The bill does not disclose the date when the *principal* of the State bonds was made payable]

The Governor was right in refusing the demand made by the Company, Nov. 5th, for bonds, without reference to the Act of Aug. 12th.

Admitted that the evidence produced of the construction and completion, ready for placing the superstructure thereon, of thirty miles of the road, was ample and satisfactory to the Governor; and that the pledge of the net profits of the road for the payment of the interest on the State bonds, and the conveyance to the State of the first 240 sections of land, in trust, for the better security of the State from loss on said bonds, was in accordance with the requirements of the constitutional amendments;—still there was a *further security*, without which the Company was entitled to no State bonds. The constitutional amendment, after providing for the evidence and securities above enumerated, provides further that

"As further security, *an amount of first mortgage bonds on the roads, lands and franchises* of the respective Companies corresponding to the State bonds issued, shall be transferred to the Treasurer of the State at the time of the issue of State bonds; and in case either of said Companies shall make default in the payment of either the interest or principal of *the bonds issued to said Companies, by the Governor*, no more State bonds shall be thereafter issued to said Company, and

the Governor shall proceed, in such manner as may be prescribed by law, to sell the bonds of the defaulting Company or Companies, or the lands held in trust as above, or may require *a foreclosure of the mortgage*."

Now, it seems to us that by the clause of the amendment just quoted, the Company was clearly required as a condition precedent to its right to State bonds, to transfer to the State Treasurer, a corresponding amount of its own bonds, secured by a mortgage on all its roads, all its lands, and all its franchises, that would give to the State an exclusive first lien thereon. A mortgage, too, for the payment of such bonds, which might be foreclosed for default in payment of either interest or principal of the *State bonds*, issued to the Company, and containing a power to the Governor, in some manner to effect or enforce such foreclosure immediately upon such default.

In *Railroad Company v. Parcher*, 14 *Minn. R.* 297, the Court say, in reference to the clause we are now considering, *at page* 303:—

"The security required by the amendment of the constitution, *and which is alleged in the complaint to have been given by the Minnesota & Pacific Railroad Company*, was a certain amount of the Company's bonds, secured by a first mortgage upon its roads, lands and franchises.

"This language will bear but one construction, and that is, that the mortgage required and given was a first mortgage, upon *all* the roads, *all* the lands, and *all* the franchises of the Company. This included the corporate franchise, or the right to be a corporation. The power to mortgage this corporate franchise was conferred upon the Company by the 21st section of its charter, or if there be any doubt as to this, it is clear that it was conferred by the amendment to the constitution, which *required*, and of course authorized all the Land Grant Companies accepting the State bonds, to secure the State by a first mortgage upon *all* their franchises, as we have before seen."

It is to be observed that this language was used by the Court, when considering the effect of the same foreclosure, which is attacked by the plaintiffs in the case at bar:—it appearing from the complaint in that case, however, that the mortgage was given under and pursuant to the provisions of the constitutional amendment, and foreclosed under and in accordance with such amendment and the acts of August 12th, 1858 and that of March 6th, 1860, upon default of the Company in the payment of the interest upon the State bonds; and the Court, assuming, of course—the case being up on demurrer to complaint—such to be the facts.

The holding is, so far as applicable to the present question, that the mortgage required by the amendment, was a mortgage upon *all* the roads, *all* the lands, and *all* the franchises, (including the corporate franchise) of the Company; and a *first* mortgage. Now the mortgage of July 31st, 1858, clearly did not cover *all* the roads nor *all* the franchises of the Company. By the 25th section of its charter, the Minnesota & Pacific Company was authorized to "locate, construct and operate a railroad, with one or more tracks, from Winona, up the Valley of the Mississippi River to St. Paul."

(*Record, p.* 15.)

The roads and franchises mortgaged were:—

"The entire railroad of the said party of the first part, *from Stillwater, by way of St. Paul and St. Anthony, via Minneapolis to the town of Breckenridge, on the Sioux Wood River, with a branch from St. Anthony via Anoka, St. Cloud and Crow Wing to St. Vincent, near the mouth of Pembina River;* also all the railways, rails, bridges, fences, ties, spikes, culverts, right of way, station houses, * * * * now held or owned, or which may hereafter be held or owned by said party of the first part, *for the purpose of constructing, operating and maintaining its said railroad, or the accommodation of*

the business thereof; also all the tolls * * * * and *alienable franchises* of the said party of the first part *connected with its said railroad*, or relating thereto."

(*Record, pp.* 34-5, *fol.* 61-2.)

The description of premises does not embrace the Winona road, nor the franchise to build and operate it; and hence was not in accordance with the requirement of the constitution in this respect.

It is at least very doubtful, too, whether by the use of the word "*alienable*" before the word "franchises," as above shown, the corporate franchise is not excluded. If it is, this is another particular in which the mortgage failed to meet the requirements of the law.

Perhaps the Supreme Court of Minnesota, in the case last cited, in holding that the mortgage required was a *first* mortgage, have not held that it should be one to secure the State *alone*, though we so understand the decision, and so interpret the law. It must be remembered that at the time of the adoption of the constitutional amendment, the company had not issued any mortgage bonds; consequently the language under consideration did not refer to any issue then in existence. The 21st section of the charter had authorized the company to issue "its bonds and obligations *in any amount* which the directors might deem necessary or expedient," and to secure the payment of all or any of them, to make and deliver "one or more mortgages or deeds of trust upon the whole or any part of its railroad or branches."

Now, the amendment either prescribed as its security, a mortgage for its own exclusive benefit, or it left the value of that security to be determined by the company alone; for if merely a first mortgage was required, without restriction as to the amount of bonds to be secured by it, it was wholly

discretionary with the company whether it should be made to secure the State alone, or to secure an issue of $10,000,000, $100,000,000, or any other amount. That it was in fact made for *only* $23,000,000, of course is unimportant, on the question of the true interpretation of the law. The right to make it for $23,000,000, or for any other sum than $1,250,000—the amount of State bonds authorized—implies the right to make it for ten times $23,000,000; and the obligation of the Governor to comply with the company's demand on 5th November, 1858, would have been no less, had the issue secured by the mortgage been the largest sum mentioned.

It has been claimed that the words "*an amount* of first mortgage bonds," imply but a part of the whole. We do not so understand the phrase, and it certainly has not necessarily any such signification. If the article "the" had appeared before the words *first mortgage bonds*, so that it had read "an amount of *the* first mortgage bonds," the claim would be plausible. As it is, we see in it no force whatever. Nor will the court so construe it if there is doubt about its meaning. The State was prescribing her own security for the contemplated loan, and choosing her own language in which to do it, and it is certainly not reasonable to suppose she *intended* to leave the value of that security entirely discretionary with the borrower.

Again The mortgage prepared and tendered by the company, was not so drawn as in terms, or by implication, to authorize its foreclosure for default in the payment of the interest or principal of the *State bonds* issued to the company, but only for default in the payment of the company's bonds; and for default of *interest* on the latter, no proceedings whatever looking to a foreclosure were authorized, until it had continued for six months.

(*Record, pp.* 29 *and* 30, *fol.* 63–4.)

It contained no authority whatever to the Governor to foreclose, or to procure or effect a foreclosure for any cause whatever—while it expressly required the trustees, at or upon the request of a majority in interest of the bondholders, to postpone any sale, attempted in proceedings for a foreclosure under the power, for a period not exceeding twelve months.

(*Record, p.* 36, *fol.* 65)

The Governor was right therefore, on the 5th of November, 1858, when he refused to accept the mortgage bonds tendered by the Company and to deliver in exchange a corresponding amount of State bonds. Because the bonds tendered were not "first mortgage bonds" within the meaning of the constitutional amendment, in that: the mortgage given to secure them, did not give to the State an *exclusive* first lien on the property mortgaged; and because the mortgage did not cover *all* the roads and franchises of the Company as required by the amendment. Also because it did not provide for a foreclosure upon default in payment of interest on the *State bonds* to be issued to the Company, in any event; nor for default of interest on the mortgage bonds, until such default should have been continued for the period of six months; and did not provide any way in which the Governor could effect or procure a foreclosure for non-payment of interest on the State bonds or for anything else; but did expressly provide for a postponement of any foreclosure sale that should be attempted under the power, for twelve months, without the assent of the Governor or the State.

It is claimed by the learned counsel for the appellents that these questions are *res adjudicata*. That the Supreme Court of Minnesota, in *Railroad Company v. Sibley*, 4 *Minn.* 13, held

the Trust Deed in question, a compliance with the requirement of the constitution—to which we have to say:—

First. The only point decided, or submitted to the court, in that case, was whether under the amendment the State was entitled to an *exclusive* first mortgage, or lien, on the roads, lands and franchises of the respective Companies to secure the bonds which she should receive from such Companies in exchange for State bonds.

(*Record, p.* 28, *fol.* 102–3.)

No other question was considered in the case, and upon this, there was a divided court.

Second. The decision is not authority, for the reason that the court rendering it, had not jurisdiction to make it. Authorities to this point, under the constitution of Minnesota, are abundant.

County Treasurer v. Dike (*State Treasurer.*) } 20 *Minn.*
Wright v. Jennison (*Secretary of State.*) } 363, 366.

Rice v. Austin (*Governor*) 19 *Minn.* 103.

Matter of the application of the Senate, 10 *Minn.* 108.

It is held in these cases that under the constitution of Minnesota, the courts of the State have no jurisdiction to control the officers of the executive department of the government in the performance of their official duties, and *cannot acquire jurisdiction* by consent of such officers.

In the case in 20*th Minn.*, *supra*, the court say, at page 366

"The exemption of the Secretary of State from coercion by the courts is not a personal privilege of the incumbent of the office, created for his benefit, and to be asserted or waived at his pleasure. An executive officer cannot surrender the defences, which, not for his, but for the public good, the constitution has placed around his office. Still less can his consent authorize this court to trangress the constitutional limitation of its powers, and assume a jurisdiction which

by the fundamental law, it is expressly forbidden to exercise."

Indeed, the same judge who had delivered the opinion of a majority of the court in *Railroad v. Sibley, in 2nd Minn.*, very shortly afterwards pronounced the (unanimous) decision of the same court, in a similar case, *against* such jurisdiction; using in the opinion the following language:

"It is not necessary to consider the merits of this case as shown by the facts detailed in the petition and answer, inasmuch as the jurisdictional question which has been raised, in our opinion, disposes of the application.

"It is insisted that the Supreme Court cannot compel the Governor by mandamus or otherwise, to perform any act or duty devolving upon him as the chief executive of the State. That he is necessarily entirely independent of the judiciary in this respect, and can be reached only by impeachment.

"This is the first time this question has been raised in this court, and we think so far at least as this application is concerned, it is well taken.

"In the case reported in 2 *Minn.* 13, we allowed a writ of mandamus to issue against the Governor of the State, but in that instance the question here raised was distinctly waived." *Chamberlain v. Sibley*, 4 *Minn.*, 309, 312.

In the later cases, as we have seen, it was determined that such question *could not be waived:* So that the decision in 2 *Minn.* is not entitled to consideration *as authority;* but should receive only the same consideration as if the persons making it had occupied no judicial position whatever. Governor Sibley was undoubtedly advised, after he had consented to submit the one question to the judiciary, that he could not thus escape the responsibility of himself determining it; and not convinced afterwards by the *argument* of the court, that he had been in error upon that question, a proper sense of his official duty impelled him to disregard and refuse to

obey the peremptory mandamus directed and issued by the court.

In this, as in his refusal of the company's demand, he was undoubtedly right.

He was right, also, in requiring of the company, before complying with its demand, *all* that is embodied in the supplemental deed. Indeed, he would have been justified in requiring, and in our judgment should have required, much more. For even with the supplemental deed the State was not given a *first* mortgage or lien on the lands, &c., of the company, nor any priority or preference over other holders of any of the $23,000,000 of bonds contemplated in the original deed; nor any lien or claim whatever upon the company's Winona branch, or the franchise to build and operate it; nor upon the *corporate* franchise, if the original deed did not cover it. Nor did even the supplemental deed provide for a foreclosure for default in payment of either interest or principal of the State bonds. The company should have been required to make an entirely new deed, embracing all these features, in addition to those embodied in the supplement.

What was the substance of the supplemental deed? Simply this:

1st. It provided that upon default in payment of interest or principal, of the bonds to be delivered to the State, the trustees should, upon demand and request of the Governor, proceed to a foreclosure of the mortgage, and, within sixty days after such default, sell the property, [prescribing the notice of sale, &c.,] and, in case of their failure or refusal so to foreclose, &c., authorizing the Governor, as the agent of the State to make such foreclosure and sale—prescribing, in case of a foreclosure and sale by the Governor, the mode of perfecting title in the purchaser.

2d. It provided that the clause in the original deed, requiring the trustees, upon the request of a majority in interest of the bondholders, to postpone any sale, in proceedings for a foreclosure, for a period not exceeding twelve months, should be inapplicable and of no force and effect in case of a foreclosure and sale by the trustees or the Governor, as in the supplemental deed mentioned.

3d. It declared all parts and provisions of the original trust deed inconsistent, or in conflict, with the provisions of the supplemental deed in respect to the foreclosure and sale, whether by the trustees or the Governor, and the time and manner of such foreclosure and sale, to be inoperative and of no force or effect.

(*Record, pp.* 61-63)

Was there anything in this deed which the Governor had not the right to exact in behalf of the State? It simply made the security subject to foreclosure upon default in payment of interest or principal of the bonds issued to the State, *immediately*—instead of only after the default had continued for six months—and upon shorter notice than that prescribed in the original deed; and provided a way in which the Governor (or the State) could enforce such foreclosure.

The mortgage, by the terms of the constitutional amendment, was required to be one of which the Governor could in some way *enforce* a foreclosure; otherwise the words "may *require* a foreclosure of the mortgage" in that amendment, are idle and meaningless; and we are wholly unable to see why, in settling the terms and provisions of the mortgage, so far as the law had not already determined such terms and provisions, the Company alone (and not the Governor) should have anything to say.

The stipulation demanded of the Company that only one-half the State bonds to which it might become entitled should be drawn on account of *grading*, leaving the balance for *completed road*, was certainly a wholesome arrangement; and we are by no means satisfied, that a fair and reasonable construction of the provisions of the constitutional amendment, would entitle the Company to more. It is hardly reasonable to suppose, that in providing for the issue of a certain amount of State bonds for each ten miles graded, &c.; and a similar amount for each ten miles of completed road, the people intended that the entire issue should be exhausted without any completed road. The object of the State aid was to get railroads—not merely graded road-beds. But however this may be, no harm came of the stipulation, for the Company received all the bonds it could have claimed without it, or under any possible construction of the contitutional provision.

Nor was the delay or embarrassment (if any) suffered by the Company, by reason of these demands of the Governor upon it, the fault of the Governor, or of the State, even if in fact, the executive journal entry of August 4th, 1858, was "first called to the attention and knowledge" of the company on the 5th day of November following, as stated in the bill (*Record, pp.* 56–7). The Company and the trustees should have known of that entry (as they easily could) before preparing and presenting their papers, three months after its date. Why all these papers were prepared and executed, without consultation with the Governor, in reference to their substance or form, in any respect; or why his views of the meaning of the law under which he was to act for the State were not sought before such preparation, it is difficult to

understand. As a matter of courtesy, if not prudence, one would have expected a different course, unless it was intended to overreach him by a requisition so sudden and pressing as to induce action without proper investigation.

Having shown that the course pursued by the Governor in Nov. 1858 was not a breach of the contract by or on the part of the State, and that the delay or embarrassment of the company (if any) resulting from that course, was not the fault of the Governor, or of the State, we come to the next alleged breach, viz.:

The refusal of the Governor and State auditor to receive the State bonds issued to the company as a basis of banking under the laws of the State.

As the State had no *contract* with the company, to receive such bonds as a basis of banking, it is not easy to see how any contract was broken by her refusal to receive them.

Nor is it quite true as stated in the bill (*Record, p.* 64, *fol.* 114) that it was the duty of the Governor and State auditor to receive such bonds, under the *general banking law* of the State.

The provisions of that law, in point here, (*to be found in the General Laws of Minnesota for* 1858, *pp.* 80–1) are as follows:

"Whenever any person or association of persons formed for the purpose of banking under the provisions of this act, shall duly assign or transfer in trust to the auditor of this State any portion of the public stocks issued, or to be issued, by the United States, or the State of Minnesota, at their current value, * * * * * such person or association of persons shall be entitled to receive from the auditor an amount of circulating notes of different denominations, registered and countersigned, equal to, and not exceeding the amount of public stocks assigned and transferred as aforesaid, but such public stock shall, in all cases be, or be made, equal to a stock producing six per cent. per annum; * * *

Provided, That if in the opinion of the Auditor and Governor, any stocks offered *shall be deemed insecure*, they shall *not* be received as such securities under the provisions of this act."

Probably the Auditor and Governor deemed these bonds "*insecure*," and if so, it was not only their privilege but their duty to refuse them.

The next alleged breach on the part of the State is, that on the 28th of September, 1859, the Governor refused, upon demand, to issue and deliver to the Company $25,000 of State bonds; only $600,000 of such bonds having been previously so issued and delivered.

The claim is that *prior to that date*, (28th Sept., 1859,) the Company had graded and completed ready for the superstructure, 60 miles of road, and upon the proper proof thereof, to the Governor, (and the transfer to the State Treasurer of a corresponding amount of its mortgage bonds,) had received $600,000 of State bonds. That *on* that day it had graded and completed ready for the superstructure, *in all*, 62½ miles of road, and produced to the Governor satisfactory proofs thereof, and had *delivered* to the State Treasurer *in all* $625,000 of its mortgage bonds; and that in these circumstances the demand of the Company for $25,000 more of State bonds was refused by the Governor. (*Record, p.* 67.)

This refusal was not only warranted but *required* by the terms of the constitutional amendment. It was only upon road made ready for the superstructure, (or fully completed with cars running thereon,) *in sections of ten miles*, that the Governor had any authority whatever to issue or deliver State bonds. The $600,000 had been issued for the grading of 60 miles,—$100,000 for each section of ten miles,—and the Governor had no authority to make (nor could the Company

acquire a right to) any further issue without the grading of another section of ten miles, or the completion with cars running thereon, of some section of equal length.

As well might the Company have claimed bonds to the amount of $10,000 upon the grading, or completion, of each mile, as to claim any amount, upon such grading or completion, of anything less than a ten mile section. This is so obviously the meaning of the constitution that we should not be justified in spending more time upon the point. Perhaps, however, it may be claimed that the stipulation entered into by the Company, (*Record, pp.* 59 *and* 60, *fol.* 105, *and p.* 64, *fol.* 113,) "*that only one-half the State bonds to which the said Company might become entitled, under and according to the constitutional amendment, should be drawn by it upon account of the grading and construction and completing its road ready for placing the superstructure thereon*,"—warranted the Company in its demand. The stipulation did not, nor could, change the law, nor authorize the Governor to violate it, of course; nor was it intended for any such purpose. Its language does not import that the Company was to become entitled thereby to bonds upon terms, *other* than those prescribed in the amendment, but simply that it should not claim *more* than half its complement for unfinished (or half completed) road.

There is no pretense that the State Treasurer was ever asked for a return of the $25,000 of mortgage bonds, nor that the Company could not have had them at any time for the asking.

The joint resolution of the legislature, of Jany. 6, 1860, directing the Governor to destroy the unissued State R.R. bonds, and such destruction; and the act of 6th March of same year, directing or authorizing a foreclosure of the mortgage by the Governor, with the foreclosure proceedings which

followed, shall next engage our attention. It is claimed that each of these acts of the State was a breach of contract, or at least an unlawful interference with the rights of the Company. We shall have something more to say of the foreclosure proceedings hereafter; at present we shall say of them only, that how, or in what way they operated to violate any contract with the Company, we are unable to see.

The following will be recollected as one of the provisions of the constitutional amendment:

"In case either of said Companies shall make *default in the payment* of either the *interest* or principal of the bonds issued to said Companies by the Governor, *no more State bonds shall thereafter be issued to said Company.*"

It is conceded that the interest which fell due on the State bonds, Dec. 1st, 1859, was not then, and has never yet been, paid by the Company. This fact, we say, is conceded. True, it is alleged, that at the time of the passage of this resolution, January 13th, 1860, the Company "had fully performed all its said obligations and duties to the State and to the Governor thereof. * * * * And the said Company had fully exonerated the State Treasury from liability on account of interest *then due* upon the State bonds delivered to said Company." (*Record, p.* 72, *fol.* 127.) And it is argued by the learned counsel that the Company may have retained the State bonds, in which case, as they did not constitute a debt of the State, as between the State and the Company, such retention would have operated as such exoneration. The argument, however, is not supported by the facts. It is abundantly shown by the bill, that under the Company's contracts these State bonds became due to its contractors quite as fast as they were issued; and it is not likely that, in the Company's financial condition, as detailed in the bill, it was allowed,

if disposed, to retain for any considerable time, any of these bonds from such contractors.

It appears (*Record, folios* 106 *and* 107, *page* 60,) that as early as November 5th, 1858, the Company was indebted to divers persons, in more than $40,000, which it had agreed to pay in these bonds; that in contracts previously made with Chamberlain, for the construction of 80 miles of its road, it had agreed to pay him $1,000,000 in such bonds, and that for work then already done by him, under such contracts, it was justly indebted, (in addition to the debts above stated) in the sum of $300,000, payable in the same way. At *fol.* 86, *p.* 48, *of Record*, its averment of 30 miles of graded road, upon which the first $300,000 of State bonds was demanded, is that the Company, "*by its said contractor, Chamberlain, pursuant to said contract with him had graded, &c.*" [The contracts referred to are alleged at *pp.* 29-30, *fols.* 52-3, *of Record*,] and, at *fol.* 114, *p.* 64, *of Record*, in the statement with reference to the refusal of the Governor and Auditor to receive these bonds as a basis of banking, it is alleged that "the holders of such State bonds, which had been delivered to said Minnesota & Pacific Railroad Company, *and by it paid out to its contractors* as aforesaid, applied to the said Governor and Auditor, &c."

Not only is it improbable, therefore, that they were so retained, but the contrary is directly averred. The most that can be claimed, as the purport of the bill in this respect is perhaps, what appears *at p.* 82, *fols.* 144-5, *of Record*, where it is averred that, at the time of the foreclosure, the State had not "*paid* any interest or sum of money on, or on account of, the said State bonds * * nor had there been any request or demand that she or any of her officers should do so. And the said Company had then, in fact,

fully and completely exonerated the Treasury of said State from advances of money for that purpose, and no such payment or advances have in fact ever been made, by or on behalf of said State." Here the *argument*, that the Company has exonerated the Treasury, &c., is coupled with the *fact* upon which alone it is based. The State has not *paid* the interest on her bonds, *therefore* the Company has exonerated her Treasury from any advances for that purpose. The logic is not sound. There is nothing in the bill that is equivalent to an allegation that such interest has been *paid* by the Company, nor that the Company has *made provision* * * * for the punctual payment of interest * * * in such manner as to exonerate the Treasury of the State from any advances of money for that purpose.

Besides, it is idle to suppose that if such interest had been paid by the Company, or if the Company had retained any of the State bonds, the learned counsel, who drew the bill, would, in either case, have omitted a direct allegation of the fact. We repeat then :

It is conceded that at the date of the joint resolution (Jan. 13, 1860,) the interest which fell due on the State bonds December 1st, 1859, had not, nor has it since, been paid nor provided for by the company.

Such being the fact, the company had made default in the payment of such interest; and under the clause of the constitutional amendment just referred to, it is too plain for argument, that it was entitled to no more State bonds, and that the Governor had no right to issue any more. The State had a right, therefore, to destroy the unissued bonds, whether blank or otherwise, and the exercise of that right was not a violation of any right of the company, nor an act of which either the company or the plaintiffs can complain.

We do not forget the proviso of the constitutional amendment, to the authority of the Governor to enforce the securities :

"That if any company so in default, before the day of sale, shall pay all interest and principal then due, and all expenses incurred by the State, no sale shall take place, and the right of the company shall not be impaired to a further loan of State credit."

But we do not understand this proviso as imposing upon the Governor, or the State, any obligation or duty after the default contemplated, to hold bonds in readiness for such '*further loan of State credit*," by reason of the possible contingency of a removal of such default; and even if we are wrong in this, it does not lie with the company, nor the plaintiffs, to complain of the destruction of those unissued bonds, until having removed the default, they find that, by reason of such destruction, they are unable to obtain such further loan (if any) as they may show the State bound to issue. The destruction clearly harms no one, so long as the State has no authority to issue, nor the company to receive, the bonds destroyed.

If the State was justified in the adoption of the joint resolution, and the destruction of the bonds, there can be no question of her authority to pass the act of 6th March following. The default just referred to, had then continued for more than three months; and in the meantime it is admitted that the Company had failed to pay the interest upon the $600,000 of its own mortgage bonds in the hands of the State, which fell due 1st February, 1860.

(*Record, p.* 72, *fol.* 128.)

The first section of the act simply makes it the duty of the Governor, to foreclose the deed or deeds of trust "or to

cause the same to be foreclosed, *in conformity with the provisions of such deed or deeds of trust, and in accordance with law*, if in his opinion the public interest requires it."

(*Record, p.* 73, *fol.* 129.)

If by the provisions of the mortgage as originally drawn, without the supplement at all, any holder of bonds to the amount of $250,000, was empowered to enforce a foreclosure, (*Record, p.* 35, *fol.* 63–4.) The authority of the State (which was then the holder of such bonds to the amount of $600,000) to cause such foreclosure in the manner prescribed in the mortgage, and in accordance with law. surely, was not open to question: nor can there be any doubt whatever of the right of the State to authorize a purchase of the mortgaged property for and in the name of the State, in case it should go to sale under such foreclosure, as provided in the only other section of the act.

We come, next, to the consideration of an act of the people of Minnesota, which, in the abstract, or upon its merits, we shall not attempt to justify or extenuate, viz., the amendments to the constitution adopted Nov. 6th, 1860.

But while our disapproval of the act is unqualified, we are unable to see in what way it affected, injuriously or otherwise, any right or interest of the trustees, under the mortgage, or of the bond holders, they represent. It was the holder of State bonds whose rights were impaired, or injuriously affected, by those amendments, not the holder of mortgage bonds; nor was any contract or right of the Company impaired by either of them. In other words, however unjust were those amendments as against the creditors of the State—the holders of the State railroad bonds—it did not lie with the Company, which, (as between itself and the State certainly) was the

principal debtor on those bonds, to complain that the State, its surety, would not pay them; nor, while refusing to pay the interest due on those already issued, to complain that the State would not issue more.

These amendments were two, though adopted together: the first to the effect that no law levying a tax, or making any provision for payment of interest or principal of the State Railroad Bonds should take effect until submitted to a vote of the people of the State, and adopted by a majority of the electors voting upon the same; the other, to the effect that there should be no further issue of such bonds, and that the previous amendment under which the issue had been made, be repealed ("expunged from the constitntion," is the phrase used); "saving, excepting and reserving to the State, nevertheless, all rights, remedies and forfeitures accruing under said amendment."

(*Record, p.* 74, *fol.* 130.)

It is unnecessary to discuss the question whether or not the first was a violation of the provision of the federal constitution disabling the State to make a law impairing the obligation of contracts. It was intended undoubtedly to prevent hasty legislation looking to the payment of anything upon the State Railroad Bonds; and *perhaps* it did so limit and curtail the legislative power in this regard as to impair the obligation of the bonds. It clearly did not impair any other contract, however, nor *any* right of the Company or the trustees.

By the other, it was certainly *not* the *intention* to abandon or waive any right, remedy or forfeiture, reserved or secured to the State by the loan amendment for all such rights, remedies and forfeitures "*accruing*" (*i.e.* accrued or *to* accrue,) are saved, in express terms. It is equally certain that it *was*

intended by it to prohibit any further issue of State railroad bonds; but this, in view of the Company's default in the payment of interest on the State bonds then already issued, was only an affirmance of the provision of the loan amendment, that in case the Company should make such default, no more bonds should be issued to it; and *by such default all the provisions of the loan amendment, not so saved by the repealing one, were entirely superseded and rendered inoperative for the future, except* that one by which the faith and credit of the State were pledged for the payment of the interest and the redemption of the principal of the State bonds, and, possibly, the one providing that if any Company so in default should, before the day of sale, pay all interest and principal then due and all expenses, &c., no sale should take place, and the right of such Company should not be impaired to a further loan of State credit.

So far as those provisions had been thus superseded, the State, of course, had a right to repeal or expunge them.

If it was intended by the repeal to relieve the State of its obligation to pay the State bonds then already issued, to that extent it was an attempt to impair such obligation, and to that extent it was therefore null and void; but no right of the Company was thereby impinged, nor have the plaintiffs any such relation to those bonds as to render the fact of such intended inpairment in any way material in this proceeding.

It is also clear, we think, that neither the Company, nor any one claiming under it, can assert any right dependent upon the removal of the default, in payment of interest on the State bonds, without first removing such default

At the time of the adoption of these amendments, the Company most certainly was not in a condition to claim more bonds; and the possibility of its ever becoming so, if not

previously gone, was wholly cut off by its acceptance of the Act of March 8th, 1861;—which act, in connection with the foreclosure proceedings, taken in behalf of the State by the Governor, will be next considered.

It is claimed by the learned counsel for the appellants:

First. That these foreclosure proceedings were void, and of no effect as against the Company or the trustees (even if up to the time of such proceeedings every obligation of the State had been faithfully performed) for the reasons—in substance:

1. That the charter of the Company and the constitutional amendment did not authorize any such foreclosure, nor a mortgage which could be foreclosed in that manner.

2. That if the Governor had such authority, however derived, he could exercise it only after the refusal of the trustees to foreclose, upon a legal and proper demand upon them to do so; and that there was no such demand or refusal.

Second. That by such proceedings, whether void or valid, the State is barred of all claim by forfeiture under the constitutional amendment; and

Third. That by such proceedings, and the legislative act of March 8th, 1861, the constitutional forfeiture was waived; and that such legislative act, "with its acceptance by the Company was a mutual rescision, and agreed abandonment, of all prior contracts, engagements and obligations."

In arguing the want of power in the Company to make

the instrument, which the Governor attempted, at least, to foreclose, and the want of authority in the Governor, in any event, to foreclose the instrument, the learned counsel *assumes* that the Company had no power whatever in the premises, beyond or except that conferred in express terms by the 21st section of its charter; and that the relation of the State to the mortgage security was, in all respects, precisely the same as if such had been the only authority of the Company, and the State had, without the constitutional amendment, become the owner of a portion of the mortgage bonds; and this assumption is the only basis of the argument.

The constitutional amendment most be wholly ignored, or the argument fails. This will not do; for as we have already seen, the amendment is no less the law of the mortgage, than is the charter. Indeed, so far as the two are not in harmony, the provisions of the amendment must prevail.

Railroad Company vs. Parcher, 14 *Minn.*, 297, 303.

In the case cited it was held, (*page* 303,) that if there could be any doubt whether the power to mortgage the *corporate* franchise was conferred upon the Company by the 21st section of its charter, it was clear that it was conferred by the amendment to the constitution, "which *required*, and *of course authorized*, all the Land Grant Companies, accepting the State bonds, to secure the State by a first mortgage upon *all* their franchises."

If, because the amendment contemplated a mortgage upon *all* the franchises, it carried with it authority to mortgage the *corporate* franchise, it follows, that the provision of the same amendment giving the Governor authority to require a foreclosure of that mortgage, in a certain contingency, carried with it authority to the Company to make a mortgage

which the Governor could require to be foreclosed in that contingency. And this authority to "*require* a foreclosure," as we have before seen, means something more than permission to request it. It implies the power to enforce, or effect, it.

We shall assume, then, that the Company was authorized to make a mortgage liable to foreclosure, through the instrumentality of the Governor, upon default. We have already considered the features of the mortgage as originally drawn and executed by the Company and the trustees, and of the supplement afterwards executed by the same parties; and wherein and to what extent the former was changed or modified by the latter.

By the supplement, the trustees were required, upon demand of the Governor, to proceed to a foreclosure, *immediately* upon the Company's default in payment of interest or principal of the bonds to be delivered to the State, and, within sixty days after such default, to sell the property; and in case of their refusal so to foreclose and sell, the Governor, as the agent of the State, was authorized to make such foreclosure and sale; and in case of such sale by the Governor he was to convey to the purchaser by deed, in the name of the Minnesota & Pacific Railroad Company.

(*Record, page* 62)

We do not deem it necessary to add to what has already been said upon the question of the validity of this supplement. In our judgment it was valid in all its provisions, and from its date was part and parcel of the one mortgage security comprised of the two papers.

With this security what did the Governor do? After having issued to the Company State bonds to the amount of $600,000 and received of the Company a corresponding amount of the mortgage bonds—some about December, 1858,

and all before September, 1859; the Company failing to pay, or provide for, the interest falling due on the State bonds December 1st, 1859. he notified the trustees of such default, and requested and required them in the name and behalf of the State of Minnesota "to make a foreclosure of the mortgage or trust deed of the said Company, made to secure their first mortgage bonds which have been deposited with the Treasurer of the State in return for the State bonds issued to that Company, *at as early a period as the terms of said mortgage or trust deed will permit.*"

(*Record. p.* 68, *fol.* 121.)

It is claimed by the appellants that this notice and demand were premature; because, as is claimed, there was then neither interest nor principal due on the *mortgage* bonds. It was not, we submit.

By the provisions of the constituion the Governor was authorized to require a foreclosure of the mortgage upon default in the payment of interest or principal of the *State bonds.* By the trust deed, it is true, the trustees were required to foreclose upon the demand of the Governor only for default in payment of interest or principal of the *mortgage bonds;* but there is nothing in the deed requiring such *demand* to be made *after* SUCH default should occur. In the absence of anything in the deed to the contrary, we think a demand in accordance with the provision of the constitution should be deemed the demand contemplated in the deed. Of course, such demand should not require the trustees to commence proceedings until default in payment of interest or principal of the mortgage bonds; but we can see no reason why the demand could not properly be made, as it was in this case, upon the occurrence of the default contemplated in the constitution, that

they proceed, not immediately, and without waiting for default in the mortgage bonds, but "*at as early a period as the terms of said mortgage or trust deed will permit.*" It will not do for the learned counsel to claim that the trustees, at the time of the demand, did not know that the State held $600,000 of the mortgage bonds and had issued to the Company, an equal amount of State bonds. In the circumstances, and with their relation to the transactions between the State and the Company, they were bound to know all these things; and their present thorough knowledge of them, as shown by the bill, with no pretense that they have acquired that knowledge since that time, shows that they, in fact, had it at the time of the demand.

The view of the trustees, as expressed in response to this demand, was that they could only foreclose for default in the payment of interest on the mortgage bonds, after such default *had continued for six months;* and acting upon such view, they paid no further attention to the demand, and did not foreclose, although it is admitted that the Company failed to pay the semi-annual interest which fell due February 1st, 1860, on the mortgage bonds. There is no pretense that they did not understand from the notice they received, the wishes and the requirement of the Governor, as well as the ground of that requirement; and as they knew also all the facts bearing upon the Governor's authority in the premises, the demand had served its purpose, and they were in duty bound, in obedience to it, upon the Company's failure to pay the interest falling due 1st February on its bonds, immediately, to foreclose:—Their failure to do so, was the *refusal* upon which the Governor was authorized to proceed and foreclose. He did not proceed at once, however; and after that default had continued for more than a month, with no action by the

trustees indicating a disposition or willingness to foreclose (unless after the default had continued for six months), the legislature, on the 6th of March, 1860, passed the act of that date, directing the Governor to proceed and foreclose in conformity with law and the provisions of the trust deed, if in his opinion the public interest required it.

(*Record, p.* 73.)

Pursuant to such direction, a foreclosure was commenced on the 24th of the next month (April), and a sale was reached the following June.

That the Governor might legally have foreclosed the mortgage without the authority of this act of March 6th, admits of little doubt, though perhaps he could not have made the purchase at the sale without the authority of the second section.

But with the provisions of the supplemental deed executed by both the Company and the trustees, and the provisions of this act, which not only direct the foreclosure, but necessarily involve, of course, the assent of the State to the mortgage, and the previous acts of the Governor, his authority in the premises would seem to be very clear.

We do not understand any point to be made against the regularity or sufficiency of the proceedings, assuming that the Governor might lawfully foreclose, except that the deed to the purchaser was made in the name of the Company, and that the State made no appropriation to pay the purchase price ; and will simply say of these objections :

The deed to the purchaser was made in exact conformity to the requirement of the trust deed ; and it will be time enough for the bondholders, other than the State, who are entitled to share in the fund arising from the sale, or the

trustees who represent them, to complain that the State has not the fund, or is unwilling to pay over and distribute it properly, when they shall have asked for such fund or distribution and been refused.

It is claimed, however, by the learned counsel, that this Court should not at this day go behind the decree of the Minnesota Court, which adjudged the sale as well as the supplemental deed void.

The "decree" referred to was made by the Judge of the District Court, of Ramsey County, in March, 1861. The Governor was named as a party defendant to the suit, and served with process, but did not appear. Of course the Court acquired, and could have no jurisdiction of him, nor of the State.

County Treasurer vs. Dike, cited supra.
Wright vs. Jennison, cited supra. } 20 *Minn.*,

Rice vs. Austin, 19 *Minn.*, *cited supra.*

Matter, application of the Senate, 10 *Minn.*, *cited supra.*

Its decree, therefore, could not affect the rights of the State, nor of subsequent parties claiming through the State under the sale, and is entitled to no consideration as an adjudication of any question involved in this suit.

These foreclosure proceedings, therefore, we claim, were valid; at the same time insisting, however, that for the purposes of *this* suit, it is wholly immaterial whether they were so or not.

If they were valid, and effectual to transfer to the State all the roads, lands and franchises covered by the mortgage, of course, neither the Company nor the trustees, from that time, had any interest whatever in such roads, lands or franchises. In that event, as the counsel says, there would be nothing left for the forfeiture under the constitution, to take

effect on—nothing covered by the mortgage, at least; nor need we invoke the aid of such forfeiture if that foreclosure was valid.

It is true the State by the act of March 8th, 1861, (*Record, pages* 85-6,) released and restored to the Company all the roads, lands, franchises, &c., which she had acquired by the foreclosure; not unconditionally, however, nor subject to any lien or claim of the trustees under the old mortgage or otherwise; but upon clearly defined conditions, upon failure of a certain one of which, it was provided that all the rights and benefits—the entire grant—conferred upon the Company by that act, should be forfeited to the State absolutely, and without any further act or ceremony whatever, to be held by the State *without merger or extinguishment*, to be used, granted or disposed of, for the purpose of aiding and facilitating the construction of said road and branch.

The foreclosure was not thus *put an end to*, nor was the Company thereby *restored to its former status*, as the learned counsel suggests; on the contrary, the foreclosure title was thereby *asserted* by the State. Every provision of the act evinces an intention on the part of the State to *maintain*, not to *abandon* such title.

All that was granted by that act, came back to the State in due time for failure in the condition referred to; but that, perhaps, is not important here. If the foreclosure was a valid one, and the title thus made was not afterwards *abandoned* by the State, that is the end of the plaintiffs' claim to the mortgaged property, whether the Company performed the conditions upon which it was reconveyed or not.

But if the foreclosure proceedings were *void*, then, clearly, there *was* something left for the forfeiture provided for in

the constitution to operate upon; for in that case the title remained, at the close of those proceedings, precisely where it had been at their commencement,—in the Company; and subject to all the conditions by the charter and constitutional amendment annexed to the grant. Such *void* proceedings could not change the title, nor estop anybody to claim the same title, as if no such proceedings had transpired.

Nor could the act of March 8th, 1861, with its acceptance by the Company, in connection with, or without, such void proceedings, operate as an abandonment or rescision, of the contract embraced in the constitutional amendment, nor as a waiver, on the part of the State, of the forfeiture prescribed in that amendment. No such intention is implied in the proceedings or manifest in the act. And even if such had been the intention of the parties--the Governor, the Legislature and the Company--they were not, any or all of them, competent to effect such abandonment, rescision or waiver.

It might *perhaps* have been competent for the State, through its legislature, to waive such forfeiture, *after it had occurred;* but before its occurrence, the provision for it, as well as the entire contract of which it formed a part, was parcel of the fundamental law of the State, and beyond the reach of the Legislature, or the Company, or the Governor, or any or all of them, to abrogate or change.

In singular contrast with, and most emphatic contradiction of, his position concerning the effect of this act of 1861, as a waiver of the forfeiture and a rescision of the contract, the learned counsel for the appellants, in elaborating another point of his case, says, referring to the contract embraced in the constitutional amendment:

"Its terms could not be varied by either the Executive, Legislature, or the judiciary of the State."

And again:

"It was the law, the whole law, and the end of the law, upon all matters upon which it spoke."

And still again:

"Even if the Company, together with all its creditors, joined with the Legislature and Governor in an agreement enlarging the power of the State, or the Governor; yet such an agreement would be a nullity, unless submitted to and adopted by the people as an amendment to the amendment of the constitution. *There was no other way to change a contract entered into by constitutional provision.*"

(*Appellant's printed argument, pp.* 64 *and* 65.)

We need not adopt this language of the counsel in every particular; but so far as it argues the absence of power in the Legislature, the Governor, the Company, and its creditors to rescind or change the contract, (or to waive or abrogate the provision for forfeiture, which is the same thing) it is directly in point, and undoubtedly sound.

We have endeavored to show, in the foregoing argument, that by virtue of the provision for forfeiture in the constitutional amendment, and the declaration of such forfeiture and resumption of the grant by the State, upon the breach of condition for which the forfeiture was prescribed,—all claim of the plaintiffs under the mortgage has become barred; unless the foreclosure undertaken by the Governor was a valid one, and left nothing for the forfeiture to operate upon; and that if the foreclosure and sale made by the Governor were valid, all such claim of the plaintiffs was thereby barred as effectually as it would otherwise be by the forfeiture. But there is still another point made by the learned counsel for the appellant that we have not yet considered, viz.:

That the St. Paul & Pacific Railroad Company is the same corporate entity as the Minnesota & Pacific Railroad Company, and so liable for its debts.

If this were so, and if our argument thus far is sound, we are unable to see that it would aid the plaintiffs in *this* suit; it would, at most, render the St. Paul & Pacific Company, personally liable for the debts of the former company; and would not involve the restoration or continuance of a lien on the property once foreclosed or barred. Nor are we quite able to understand how the plaintiffs can be permitted to implead the two companies separately, and then on demurrer to the bill, insist that they are one and the same. But it is not so. The two companies are not one and the same. In *Huff vs. The Winona & St. Peter Railroad Company*, 11 *Minn.*, 180, and in *Hilbert vs. the same company*, *Ibid* 246, (the Winona & St. Peter Company having succeeded the *Transit Railroad Company*, which was one of the Land Grant Companies, in in the same way that the St. Paul and Pacific succeeded the Minnesota & Pacific,) and in *Fitz vs. The Minnesota Central Railway Company*, *Ibid* 414, (the Minnesota Central having succeeded another of the Land Grant Companies in the same way,) the contrary is distinctly held

In the first case above cited the Court say, *at page* 190:

"What then was the intention of the act of 1862? Manifestly the Legislature intended by said act to transfer to the defendant the franchises and property formerly owned by the Transit Railroad Company; of this there can be no doubt. But it is claimed by the plaintiff that the said act revived said company and transferred and continued to it, under the name of the Winona and St. Peter Railroad Company, the property and franchises which it had forfeited to the State; that the defendant and said Transit Railroad Company, are the same identical corporation. After a careful

consideration of the act, we find not one sentence or section that justifies this conclusion; the tenor of the whole act seems to us inconsistent with such view."

In the *last* case cited the Court say, *at page* 421:

"The plaintiff's counsel argues that the identity of the franchises is proof of the identity of the corporation, but this cannot be admitted. The Legislature had the right to convey the property and franchises which had been forfeited to or acquired by the State to either the old company, or a different one."

And close at page 423 with the following paragraph:

"In this case, from a review of the whole act, we think the conclusion irresistible, that the Legislature did not intend thereby to revive the old corporation, or to re-grant to it its forfeited property and franchises; and so far as the decision in this case is concerned, that it is a question of no importance whether the Legislature had, or had not, the power to create a new corporation."

In *Railroad Co. v. Parcher*, 14 *Minn.* 297, already several times cited, a later case than the others, and which involved the construction and effect of the Act of March 10, 1862,—set out in full at *pages* 88–93 *of Record*—the Court say, at *page* 309, after referring to and quoting several sections of the act:

"The language of these sections requires neither comment nor explanation to show what was intended and attempted by the Legislature. *It is plain that these sections operated to transfer to the persons named, all the roads, lands and franchises of the Minnesota & Pacific Railroad Company,* (which, as we have endeavored to show, the State had acquired,) and so far, there can be no objection taken to the action of the Legislature. But it is urged that the act transcends the powers of the Legislature, because it attempts to form a corporation by special act, in violation of *Sec.* 2, *Art.* 10, *of our Constitution.*

"Whatever may be the meaning of the constitutional inhibition referred to, we are of opinion that it does not forbid such

legislation as was had in this instance. There was no attempt here to create new corporate franchises, and thus to form, and bring into existence for the first time that which is the very essense of a corporation, and without which a corporation is nothing; but *corporate franchises already in existence, and held by the State as property*, without merger in its general sovereignty, and without extinguishment, *were transferred to the persons enumerated in the act.* This, we think, was a legitimate and constitutional transaction.

"The complaint alleges that the St. Paul & Pacific Railroad Company was duly organized under and in pursuance of the Act of March 10th, 1862, *and it follows that it became and was a corporation*, and succeeded to and was vested with all the roads, lands and franchises of the Minnesota & Pacific Railroad Company."

The manifest import of these decisions is this:

That the successor Company is not, in any of these cases, the old or predecessor Company, revived; but is in every instance, a Company born of a legislative transfer of franchises held by the State *as property*, to certain persons named in the act of transfer. That by such transfer, accompanied with authority to the persons receiving it, to organize as a body corporate, for the use and administration of such franchises, and such organization, a corporation is created or brought into existence, and that, too, without a violation of the provision of the State constitution, inhibiting the formation of corporations by special act; and that the corporation thus formed is not the old or predecessor corporation at all, but a new and wholly different one.

Such are the decisions of the highest court of the State of Minnesota; and as this is purely a question of local law, depending on the constitution and statutes of the State, this court will follow those decisions [A suggestion, by-the-way, equally applicable to the decisions of the same court herein

before cited, concerning the jurisdiction of any court of the State upon questions touching the duties of executive officers of the State government.]

Curran v. State of Arkansas, 15 *How.*, 304, 309.

The same question has also been before the federal court, at least twice, with the same result. In *Hopkins v. the St. Paul & Pacific R. R. Co.*, 2 *Dillon, C. C. Rep.*, 396, it was held squarely (Dillon, judge), that the defendant was not the same corporation as the Minnesota & Pacific Railroad Company; and in *McDonald v. the Winona & St. Peter R. R. Co.*—not reported, but referred to in the opinion in the case in 2 *Dillon*—the same doctrine had been previously held by Mr. Justice Miller.

In conclusion we have only this further to say:

The allegations of the bill, with reference to the interest of the respective defendants, other than the Minnesota & Pacific Railroad Company, in the property covered by the plaintiffs' alleged mortgage (*Record, pp.* 98-100,) sufficiently indicate the fact that of the roads, lands, &c., transferred to the St. Paul & Pacific R. R. Co., by the act of March 10th, 1862, a portion has since gone to the First Division of the St. Paul & Pacific Company, and a portion to the Stillwater & St. Paul Co., leaving a portion still in the St. Paul & Pacific; and the same allegations show quite definitely the interest of each and all of the other defendants in such property.

That these new Companies have constructed the roads, as far as they have been constructed; and, to enable them to do so, have executed the various mortgage deeds, and made and negotiated the several issues of mortgage bonds, amounting

to tens of millions of dollars, described at pages 99 and 100 of the Record, is fairly inferrible from the bill, if not directly alleged in it. It is also a matter of history and of public notoriety.

These mortgage deeds have been made, and the bonds issued, negotiated, and purchased, upon the assumption and belief, that the effect of the legislation of March 10, 1862, was to transfer to, and vest in, the St. Paul & Pacific Railroad Company, all the roads, lands and franchises, which had formerly belonged or pertained to the Minnesota & Pacific Railroad Company, free and discharged, as well from the lien of the plaintiff's alleged mortgage, as from all other liens thereon, and the plaintiffs and the bondholders whom they represent, have known of this assumption and belief, and of such mortgage deeds and of such issue and negotiation of these mortgage bonds, from the beginning; such is the inevitable inference from the averments in the bill of present knowledge of all such facts, with no pretense of having acquired such knowledge otherwise than from personal cognizance of the facts as they transpired. And yet the plaintiffs and the parties they represent allowed such assumption to remain unquestioned year after year (for more than ten years) until, upon the faith of it, such vast sums of money had been, by innocent persons invested in the enterprise, through which money has been given to the property all the value it has.

In these circumstances, we submit, there must be clearly shown some most manifest and vital defect in the title so claimed and asserted by the State in March, 1862, or the court will not at this day pronounce that title without foundation.

H. R. BIGELOW, } Of Counel for Respondents.